

Pennsylvania Family Lawyer



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FROM THE CHAIR

By Cheryl L. Young, Esq.
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Well, I can say that I am much more sympathetic to my predecessors, as well as to several of our Section members who have diligently and tirelessly pursued legislative changes with regard to family law issues. This has been quite a roller coaster ride, particularly in light of the fact that we have been trying to



Cheryl L. Young, Esq.

plan the Winter Meeting.

With regard to the Custody Bill, it really looked like a go. It had passed the House and then it passed the Senate

with a few amendments that we had heard were already acceptable to the majority of the House. The House only had to reconvene briefly before year-end to approve the amendments and then, with the governor's signature, the custody legislation that we have been working on for 10 years would become law. We were so confident, based on all that we were hearing and the status of the bill, that we had even planned a plenary session for our Winter Meeting in Lancaster around the bill. We had all our speakers lined up and were very excited to present this topic to our members. Then we found out at the last minute that the legislators were not recon-

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FROM THE CHAIR COLUMN

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vening this session at all and that nothing would get passed by the House. Then, we were told they would meet and, lo and behold, they did! I am very excited to announce that Senate Bill No. 1639 passed both the House and the Senate, and was signed by the governor on Nov. 23th. I have to admit that I am glad I am a lawyer — even along with all of the frustrations and pressures that come with it — as opposed to a legislator, as I personally would not have the patience for that job.

As to the Winter Meeting, we are very excited. The program planning is almost complete and we believe that the speakers and topics will really be terrific. We are also excited about the location as we have not been to Lancaster as a Section and the Marriott is new, modern and beautiful. Our Finance Committee has prepared a draft of a report that will be presented to Council in January. In light of their concerns, we will be returning to the format of one reception that is substantial and one that will be light *hors d'oeuvres*. Therefore, we will be publishing a list of the many terrific local restaurants for people to try on Saturday night after the cocktail reception. We will then bring everyone back for a hospitality suite later in the evening.

In addition, we have had some very interesting cases that have been issued by the appellate courts in the last six months. I am sure readers of this publication will enjoy reading the case notes and articles to become acquainted with the ever-evolving case law in our field.

The PBA has a number of initiatives this year as well. Many of these may interest some of our members. If anybody has an interest in the following, please feel free to contact me and I will put you in touch with the right people.

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From time to time, the *Pennsylvania Family Lawyer* will publish articles that it receives for submission. The views expressed in those articles are solely those of the authors of the articles and do not reflect the views or policies of the editors, the *Pennsylvania Family Lawyer*, the Family Law Section or the Pennsylvania Bar Association, and no endorsements of those views should be inferred therefrom.

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First, we have a Constitutional Review Commission, chaired by former Commonwealth Court **Judge James G. Colins**. He has requested that PBA Committees and Sections provide input as to issues that may affect our constituency as related to the Constitutional Review. If anybody has any particular concerns or comments, I would love to hear from you.

In addition, the Interbranch Commission on Juvenile Justice is studying issues surrounding juvenile court, particularly as a result of the recent occurrences in Luzerne County. We have appointed two of our members, **Maria Gibbons** and **Carol McCarthy**, to that committee and they are working diligently on these efforts. Again, if anybody has any particular concerns or comments, please feel free to contact me, **Maria** or **Carol**.

Finally, as one of our cost-cutting measures, we are seeking to increase our online use of and decrease our mailing subscriptions for *The Pennsylvania Family Lawyer*. Therefore, we will likely implement an opt-out provision for the online version rather than an opt-in provision. In other words, you will receive notice of publication of *The Pennsylvania Family Lawyer* via e-mail. You can then go online to read and/or print any sections, such as case notes and articles, without printing the entire publication, which includes pictures and other items that may not require printing. We appreciate everyone's willingness to go paperless, particularly in light of the savings this will have for the Section. Believe me, I am sympathetic, as I am going kicking and screaming into a paperless world myself.

I very much look forward to seeing all of you in Lancaster in January. It should be a great meeting with a perfect combination of education, camaraderie and fun.

**Photos from the PBA Family
Law Section 2010 Summer
Meeting on page 238!**

**See MANY more past and present
photos by visiting the Family Law
Section area of the PBA Web site!
Just go to [www.pabar.org/public/
sections/famco/meetings](http://www.pabar.org/public/sections/famco/meetings).**

EDITOR'S COLUMN

By David S. Pollock, Esq.
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The Editorial Board of the *Pennsylvania Family Lawyer* wishes you good and happy holiday traditions and family gatherings for Hanukkah, Christmas and the New Year. When time "falls backward" each year, it just amazes me that another year has gone by so quickly. Now that Rita and I are in another decade and are delighted grandparents, we keep looking forward and never backward to new and more wonderful things happening in our lives. We wish you all the best, good health, happiness, friendship and family.

Please look at our newest section, "Federal/Military Corner." **Mark E. Sullivan, Esq.**, will be providing important practice materials each quarter. In this issue, Mark brings us the first in a three-part series on the Survivor Benefit Plan, taking as a starting point a case reported from the Berks County Court of Common Pleas and affirmed by the Superior Court, *Jarvis v. Jarvis*, 928 A.2d 1134 (Pa. Super. 2007). The "Federal/Military Corner" will have materials focused on military issues such as pension division, Survivor Benefit Plan, garnishment for child support, how to read and understand the Leave and Earnings Statement, how to obtain a stay of proceedings (or oppose one) under the Servicemembers Civil Relief Act, how to serve civil process on military personnel and numerous articles on CSRS, FERS, life annuity and survivor annuity, and FEHB (Federal Employee Health Benefits). Mark is very excited to see a regular column on federal civil service retirement, military retirement and related topics. He indicated that he would be covering military custody cases and legislation, support, Servicemembers Civil Relief Act and the like in future issues. Mark will be able to provide an extended and straightforward explanation of the Survivor Benefit Plan for the next several issues, using the case facts in *Jarvis* as the beginning. Mark authored the *Military Divorce Handbook* (ABA 2006), which we keep in our library. He is a retired Army Reserve JAG colonel. He has been certified as a specialist in family law by the North Carolina State Bar since 1989 and for me he has been a "go-to guy" since we first published his materials for one of the PBA Family Law Section Annual Meetings. I wanted to mention that he has been awarded the Army Meritorious Service Medal for legal assistance services during the Persian Gulf conflict in 1991 and received the Outstanding Military Attorney Award, Worldwide Army JAG Conference, October 1974. Mark has been at the forefront of these military issues for his entire career and we are quite fortunate to have his published articles.

David S. Pollock is a Co-Founder of the Pittsburgh firm of Pollock Begg Komar Glasser LLC, Editor-in-Chief of Pennsylvania Family Lawyer, Past Chair of PBA Family Law Section, Past Chair of ACBA Family Law Section, Treasurer of Pa. Chapter of AAML, and Fellow of both the AAML and IAML.

As always, several diverse case notes are provided in this issue:

- a. *Smedley v. Lowman* – **Robb D. Bunde, Esq.**
- b. *In Re: J.C.* – **Christian V. Badali, Esq.**
- c. *J.M.R. v. J.M.* – **Andrew D. Taylor, Esq.**
- d. *In Re: R.M.G.* – **Elizabeth J. Billies, Esq.**
- e. *Balicki v. Balicki* – **Michael E. Bertin, Esq.**

Michael's case note is followed by a comment on and analysis of *Balicki* by **Catherine M. McFadden, Esq.**

Further, the variety of articles continue to be of significance to all areas of family law:

"Discipline of Pennsylvania Psychologists Relies Upon An Unlawful Delegation of Rulemaking Authority" by **Administrative Judge David N. Wecht and Jennifer H. Forbes, Esq.**

"Divorce in the Most Critical Decade" by **Joan K. Crain, CFP, CTFA, CISP, BNY Mellon and Neil S. Brown, BNY Mellon**

"Jewish Holiday Guide for Custody/Visitation Schedules" by **Alexandra Leichter, Esq.**

"The Use of Forensic Evaluations in Child Custody Cases in Divorce Proceedings" by **Maddi-Jane Sobel, MSW, LCSW, DCSW; Stephen Miksic, Ph.D.; and Tom Haworth, Ph.D.**

"Health Care Reform" by **Sarah L. Church, Esq. and Joni L. Landy, Esq.**

"QDRO or Buyout: Preparing Today for a Secure Tomorrow" by **Theodore K. Long, Jr., President, Pension Appraisers, Inc.**

"Alternative Pleading in a Divorce Action? Not so Fast!" by **James W. Cushing, Esq.**

Make sure you read **Stephen F. Rehrer's** review of the recently enacted Custody Bill.

Enjoy our annual seasonal contributions near the end of this quarterly. We look forward to seeing you at the Marriott Lancaster at Penn Square for the PBA Family Law Section Annual Winter Meeting. It is so accessible and so reasonably priced and the CLE is so good (and inexpensive), that it is hard to imagine anyone passing up the Annual Winter Meeting. The schmooze, the fellowship, the cocktail parties and dinners are well worth the price and the convenience is too good.

Rita and I, Adam, Michal and Madeleine, Josh and Alicia and Millie and Moe wish you and your families health and happiness during the holiday season and New Year.

P.S. Please note that we are going to put the newsletter online as a cost-savings means, so please make sure that you have provided the PBA with an e-mail address (could be your office, home or that of a family member) so we can notify you when a new issue has been published. Use the PBA online membership update form at www.pabar.org/public/Membership/memberupdate.asp or simply type "Member-email address update" in the subject line of an e-mail and send to jodi.wilbert@pabar.org.

Case Notes:

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VOLUNTARY RETIREMENT AT AGE 52 TO TAKE PENSION WARRANTED IMPOSITION OF AN EARNING CAPACITY FOR CHILD SUPPORT PURPOSES BY ROBB D. BUNDE, ESQ.

SMEDLEY V. LOWMAN
2 A.3d 1226 (Pa. Super 2010)

This is a Superior Court case that originated from Franklin County Judge Herman's child support order. The parties were the parents of a 7-year-old child. A support order was entered against appellant-father. At the time of the support hearing, father was 52 years old and had retired from his job with the local police department. Father was receiving his pension at the time of the hearing. The pension benefits were approximately one-half of father's previous income. Father expressed no intention of supplementing his pension with additional income. In addition to the pension benefits, the hearing officer assigned father a \$200 per week earning capacity, the equivalent of part-time employment. The hearing officer's findings were ultimately adopted as the basis for the final support order. Father appealed to the Superior Court alleging error in the assignment of the earning capacity on the basis that father did not retire to avoid paying support and further on the basis that his pension became fully vested upon his retirement.

The Superior Court (Stevens, Donohue and Kelly, JJ) affirmed the trial court's ruling and denied father's appeal. The Superior Court's, per Kelly, J., reasoning was based primarily on Pa.R.C.P. 1910.16-2(d)(1), relating to voluntary reduction of income. The court opined that father's retirement at age 52 amounted to a voluntary reduction in income. The court was not persuaded by father's argument that his retirement did not constitute such a voluntary reduction because it was not an "early" retirement because he was

receiving fully vested pension benefits. The court also rejected father's contention that retirement at age 52 did not amount to a voluntary reduction in income because he retired with fully vested pension benefits.

The Superior Court stated that voluntary retirement "does not entitle the appellant to a reduction in his support obligation." Instead the court stated, "the change in the appellant's economic situation due to retirement merely allows him an opportunity to demonstrate the need for a reduction." Citing *McFadden v. McFadden*, 563 A.2d 180, 184 (pa. Super. 1989). Upon review, the Superior Court cited Pa.R.C.P. 1910.16-2(d)(1), which provides:

(1) Voluntary Reduction of Income. When either party voluntarily assumes a lower paying job, quits a job, leaves employment, changes occupations or changes employment status to pursue an education, or is fired, for cause, there will generally will be no effect on the support obligation.

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Robb D. Bunde is a Shareholder with the Pittsburgh firm of Bunde, Gillotti, Mulroy & Shultz P.C. He has concentrated his practice in areas of family law such as equitable distribution, alimony, child support, paternity, custody and pre-nuptial agreements for 18 years. Mr. Bunde is a Fellow of the American Academy of Matrimonial Lawyers. He has been active in the Family Law Sections of both the Allegheny County and Pennsylvania Bar Associations. Mr. Bunde has been a Council member of the Allegheny County Bar Association Family Law Section. He has been Co-Chair of the Rules Committee as well as a member of the Court Relations; Guidelines; Legislation; and Membership committees. Mr. Bunde also served on the Finance Committee of the ACBA. He has served two terms as a member of Council of the PBA Family Law Section. He served on the PBA Family Law Section Paternity Task Force and testified on behalf of the PBA before the Pennsylvania Legislature concerning paternity legislation. He is a frequent lecturer on family law matters.

David L. Ladov is a Partner in the West Conshohocken office of the law firm of Cozen O'Connor, Case Notes Co-Editor of Pennsylvania Family Lawyer and Past Chair of the PBA Family Law Section. Lori K. Shemtob is a partner in the Blue Bell law firm of Shemtob & Shemtob, Case Notes Co-Editor of Pennsylvania Family Lawyer and member of Council of the PBA Family Law Section.

CASE NOTES

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The court ruled that father's retirement clearly amounted to voluntarily leaving employment and Rule 1910.16-2(d)(1) applied. As such, father was deemed to have failed to obtain appropriate employment. Therefore, an earning capacity was warranted under 1910.16-2(d)(4).

The court noted that the earning capacity assigned was not equal to the same father had earned prior to retirement and, as such, the hearing officer had actually ruled favorably for father. The inference being that father could have been held to an earning capacity that was equal to that which he

had earned prior to his retirement. Finally, the court stated that although father was entitled to retire after more than 30 years with the police department, he had the interests of his 7-year old child to consider. Based on those reasons, the court found no abuse of discretion in the support order.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS:

The Superior Court did not really address the issue of whether there must be a finding that the obligor switched employment in order to avoid the support obligation. The court seemed to think the analysis stops at determining whether the employment is appropriate. If it is, then an earning capacity is appropriate. Therefore, the reasons for the change of employment do not seem to be relevant.

GRANDMOTHER AS LEGAL CUSTODIAN NOT ENOUGH IN DEPENDENCY HEARING WHERE IT IS A SHAM BY CHRISTIAN V. BADALI, ESQ.

IN RE J.C.

5 A.3d 284 (Pa. Super 2010)

On Aug. 16, 2010, the Superior Court (Donohue, Shogun and Lazarus, JJ.) in an opinion written by Judge Donohue, affirmed the decision of the Philadelphia Family Court Judge Patrick-Jonakin, who had denied a grandmother's petition to dismiss a DHS dependency petition. The Philadelphia Family Court ruled that the child in question in this matter lacked proper care and found that no immediate sufficient care was available. It also found that the child would not receive proper care if the child were released to his grandmother. Finally, the lower court found that although grandmother could qualify as a possible custodian for the child, the grandmother in this case was not qualified to provide that care for the purposes of this dependency action.

Christian V. Badali is a Partner with the Norristown office of the firm of Weber Gallagher Simpson Stapleton Fires & Newby. Mr. Badali is the current Treasurer of the Family Law Section of the Montgomery County Bar Association. Mr. Badali will become Chair of the section in 2013. He is also a member of the American Bar Association Family Law Section and is active in the Pennsylvania Bar Association Family Law Section.

The Superior Court believed that grandmother's joint custody was a sham, to protect mother and aid her in regaining custody of the child, if she were to lose custody.

The relevant facts are that J.C. was a minor, age 11, who has Down's Syndrome. He was found wandering the streets of Philadelphia near 67th Street and Woodland Avenue, a neighborhood described as "crime-infested" and frequented by "people who like to deal with little kids not at a good level" on or about Aug. 4, 2009. The police found the child dressed in nothing but his underwear. They attempted to question him, but he was unable to tell them where he lived. After getting him food at a local McDonald's, the police drove up and down the streets until they found someone who recognized the child and knew where he lived.

When the police went to the home where the child's mother lived, they found her incoherent and slurring her words. The Department of Human Services (DHS) was called and the child was delivered to their services. It was found that an investigation had been begun in 2008 based upon a General Protective Services report. DHS had attempted to visit the child's mother and found the family home in complete disarray and bad repair. It was also reported that the child had often attended school unkempt and in dirty clothing. Mother had a history of drug abuse and two of the child's siblings had already previously been committed to DHS.

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DHS spoke with both mother and grandmother (appellant), neither of whom knew the child had wandered away from their care. Grandmother and mother informed DHS about a 2001 custody order from Domestic Relations in Philadelphia that provided that grandmother was the legal guardian for J.C.

The trial court, at a hearing in August 2009, granted DHS's Application for an Order of Protective Custody and placed the child in kinship foster care with a maternal great aunt. Grandmother presented an oral motion, through her counsel, requesting dismissal of the DHS petition. Following this hearing, the trial court denied grandmother's motion, adjudicated the child dependent and ordered him committed to the care of DHS.

Grandmother appealed the trial court's decision, arguing that it was error to deny her Motion to Dismiss, that the trial court had not proven by clear and convincing evidence that the child was dependent and that it was not necessary to commit this child to the DHS.

The Superior Court disagreed on all three counts. The standard that the Superior Court must use to determine whether a trial court abused its discretion in dependency cases is to determine whether the trial court made a comprehensive inquiry and used the correct legal standards. *In re F.B.* 927 A.2d 268, 272 (Pa. Super. 2007). The Superior Court also has a broad standard of review in dependency cases. But this standard of review is limited because it cannot nullify the fact-finding done by the court below, as this must be given great weight. *In re D.A.* 801 A.2d 614, 617-19 (Pa. Super. 2002) (en banc).

The court first looked at the Juvenile Act, 42 Pa.C.S.A. § 6301 *et seq.*, where a dependent child is "one without proper parental care or control ... as required by law." 42 Pa.C.S.A. § 6302. If the court finds that a child lacks this proper care, it must do so by clear and convincing evidence. Grandmother argued that all that was proven at trial was that mother has not provided proper care or control over J.C. All the failures regarding this child were mother's and not grandmother's.

The Superior Court disagreed and found that there was a paucity of evidence supporting the fact that grandmother was indeed the child's legal guardian. The trial court, as part of the opinion below, stated it had been shown the custody order that gave grandmother legal custody of the child, but that order was never admitted into evidence.

Even if the Superior Court could take judicial notice that this custody order existed as grandmother requested, if the order existed, it existed for the purposes of another proceeding, from which the court has no records and could not

review anything but the records from the case before it. *In re Estate of Brockerman*, 480 A.2d 1199, 1202 (Pa. Super. 1984). It also will not take judicial notice of something that the court below was not asked to take judicial notice.

More importantly, the Superior Court said its review of the dependency action determined that the trial court did not just find that mother lacked care and control of the child. The court stated that the trial court clearly and convincingly found that this child lacked care and control *period* and that no care or control was immediately available from any source.

The Superior Court found that neither mother, nor grandmother, nor anyone close to this child, was providing his proper care and control. The trial court had found that grandmother fully cooperated with mother despite mother's inability to care for J.C. The trial court also found that when mother could not care for the child, grandmother had not stepped in to provide care for the child in her stead. The Superior Court agreed with these findings from its review.

The trial court also apparently felt that grandmother's custody arrangement with mother was a complete sham upon the court system. It worried that if the child were put into the care of grandmother, that the child would soon be back living with mother. The Superior Court fully agreed with this finding.

Finally, the Superior Court reviewed Section 6351 of the Juvenile Act, which outlines the procedure for determining who may care for the child after dependency is determined. The court stated that while grandmother could be considered as part of the class of people eligible to care for J.C., in this case she was disqualified due to the fact that she failed to care for J.C. all this time and had not shown the proclivity to do so in the future. She would likely just return the child to mother as she had in the past.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS:

It seems clear that the Superior Court felt the trial court had made a reasoned decision here and was determined not to disturb that decision. It also appears clear that this court saw through the sham that was the 2001 custody order. Mother and grandmother appeared to have a pact of sorts to make sure that mother could not lose custody of this child. Once the court below and the Superior Court cracked that sham, there was no way this child was going back to mother or grandmother, at least at this time.

This case should not be viewed as one that damages grandparents' rights in these type of dependency actions. This case was very fact-specific. Where the court found that the grandparent's custody of the child was a mechanism to return custody to mother, it prevented that from happening. It should also be noted that the trial court's opinion gave both mother and grandmother supervised visitation with J.C.

FATHER GIVEN SECOND CHANCE AFTER RUNNING AFOUL OF CHILDREN'S FAST-TRACK RULES, BUT LOSES ON APPEAL

BY ANDREW D. TAYLOR, ESQ.

J.M.R. v. J.M.
1 A.3d 902 (Pa. Super. 2010)

The Pennsylvania Superior Court (Bender, Panella and Lazarus, JJ.), in an opinion authored by Judge Bender, affirmed an order by the York County Court of Common Pleas (Uhler, J.) and held that: (1) Father did not waive his issues on appeal, even though he did not comply with the new Children's Fast-Track Rules as well as an Order from the Superior Court directing him to file a Concise Statement; (2) Pennsylvania had jurisdiction of this custody action since it was the home state of the child and both parties resided in Pennsylvania and; (3) the trial court did not misapply the *Gruber* factors in denying father's request to relocate the child to Erie.

In *J.M.R.*, mother and father lived in Maryland from when the child was born in 2004 until 2007, at which time the parties separated and mother moved to York County. At that time, mother and father entered into a custody agreement, filed in the Maryland Court, wherein the parties shared legal and physical custody.

Mother then began a relationship with her fiance and moved into his house in York County. In May 2008, father entered into a relationship with his girlfriend in Baltimore and two months after he began this relationship, his girlfriend moved in with him. In August 2009, father and his girlfriend moved to the girlfriend's hometown of Erie. Mother agreed to father's relocation to Erie only under the conditions that it was temporary and for the purpose of assisting in the medical treatment of father's girlfriend's daughter, and that mother would see the parties' child based on the same schedule as before. In February 2009, father informed mother that she would no longer see the child pursuant to the schedule in the Maryland Order and that he was not moving back to Baltimore but was staying in Erie permanently. Mother then filed for custody in York County.

Father filed Preliminary Objections challenging venue and asked that the case be transferred to Erie County. The trial court held that York County could exercise jurisdiction over the custody matter, since mother and father shared physical custody. After two days of trial, the court entered an order granting mother primary physical custody.

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Father appealed the Order to the Superior Court but did not file a Concise Statement of Errors Complained of on Appeal with his Notice of Appeal as required by the 2009 amendments to the Pennsylvania Rules of Appellate Procedure pertaining to Children's Fast-Track appeals. The Superior Court entered an Order on Oct. 13, 2009, directing father to file a Concise Statement by Oct. 23, 2009. Father failed to comply with this order and untimely filed a Concise Statement on Nov. 2, 2009. The Superior Court *sua sponte* dismissed father's appeal for failure to comply with the Oct. 13, 2009 order. Father then filed an Application to Reinstate Appeal, which was granted by the Superior Court.

The court first addressed the issue of whether father's issues on appeal were waived as a result of his non-compliance with the Rules of Appellate Procedure and the court order. It was not disputed that father failed to comply with Pa.R.A.P. 1925 in that he did not file a Concise Statement simultaneously with his Notice of Appeal, as required by the new Children's Fast-Track Rules. Further, father did not comply with the order directing him to file the Concise Statement by Oct. 23, 2009. The Superior Court acknowledged the recent case of *J.P. v. S.P.*, 991 A.2d 904 (Pa. Super. 2010), wherein the appellant failed to file a Concise Statement with her Notice of Appeal and subsequently failed to comply with a trial court's Order to file the Concise Statement by a certain date. In that case, the court deemed mother's issues waived on appeal.

The Superior Court distinguished this case from *J.P.* since in this case, the Superior Court, as opposed to a trial court, issued the order for the appellant to file a Concise Statement. Nevertheless, the Superior Court extended the rationale in *J.P.* to this case, but gave father a pass since this was the first case to address a litigant's failure to comply with a Superior Court order to file a statement as opposed to a trial court's order. The court also noted that father's misstep was not prejudicial to any of the parties and did not impede the trial court's ability to issue a thorough opinion. However, for future cases, the court stated that "... we hold that when an appellant henceforth fails to comply with a directive from this court to file a Concise Statement, any claims on appeal shall be deemed waived. ..."

The court addressed father's challenge to jurisdiction. Initially, the court noted that father did not challenge jurisdiction at the time of trial and failed to raise the issue in his brief to the Superior Court. However since the parties or the

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court, *sua sponte*, may raise the issue of subject matter jurisdiction at any time the issue was addressed.

Stated simply, pursuant to the UCCJEA, a court of this commonwealth has jurisdiction to make an initial child custody determination if Pennsylvania is the home state of the child, another state does not have jurisdiction of the matter and the parties have significant connections with Pennsylvania. The court found that Pennsylvania had jurisdiction in this case since Pennsylvania was the home state of the child. Specifically, the court found compelling that, although father's move to Erie was initially temporary, his intentions later changed and father had permanently relocated to Erie. In addition, the court found that the trial court made appropriate findings to indicate that the child, the child's parents and any person acting in a parental capacity no longer resided in Maryland but instead in Pennsylvania. Accordingly, the trial court properly concluded Pennsylvania had jurisdiction.

Father also claimed that the court erred in awarding mother primary physical custody pursuant to *Gruber v. Gruber*, 583 A.2d 434 (Pa. Super. 1990). The Superior Court held that the trial court properly addressed and considered the three prongs of *Gruber* as follows: (1) Father's move to Erie focused on the proximity of father to father's girlfriend and the better school system and the rural character of the

residence was a "happen chance result" of the move rather than the goal; (2) Father's motive in moving to Erie was one of convenience to be with his girlfriend and his girlfriend's two children. Further, father moved to Erie after having only a short-term relationship with his girlfriend, which the court found whimsical; (3) the commute between Erie and York counties make an equally shared custody arrangement impractical. The court noted that father's move to Erie, while within the boundaries of Pennsylvania, is the equivalent of a trip to Europe by way of automobile.

Accordingly, the Superior Court upheld the trial court's decision awarding mother primary physical custody of the minor child in York County.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS:

Perhaps the most important issue for practitioners in *J.M.R.* is a reminder that for all Children's Fast-Track appeals, a Concise Statement of Errors Complained of on Appeal must be filed simultaneously with the Notice of Appeal. More importantly, if the trial court (and from now forward, the Superior Court), issues an order directing the appellant to file the Concise Statement by a certain date, missing that deadline will result in dismissal of the appeal. The cases following the 2009 amendments to Pa.R.A.P. 1925 seemed to give practitioners a break if they failed to comply with the new rules. It appears that that trend is slowly reversing now that more than a year has elapsed since those 2009 amendments.

PA. FAMILY LAWYER INDICES by Joel Fishman Ph.D.:

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Vols. 1-20 (1980-98) in cloth binding (fishman@duq.edu)

Vols. 21-23 (1999-2001) in 24 Pa. Family Lawyer 70 (November 2002)

Vols. 24-26 (2002-04) in 27 Pa. Family Lawyer 63 (September 2005)

Vols. 27-29 (2005-07) in 30 Pa. Family Lawyer 32 (April 2008)

**PARENT’S PARTIAL PROGRESS TOWARD REUNIFICATION
NOT ENOUGH TO OVERCOME PETITION FOR GOAL CHANGE
AND TERMINATION
BY ELIZABETH J. BILLIES, ESQ.**

**IN THE INTEREST OF R.M.G., A MINOR:
APPEAL OF: YORK COUNTY CHILDREN
AND YOUTH SERVICES
997 A.2d 339 (2010)**

In the decision of *In re R.M.G.*, the Superior Court (Gantman, J.) reversed the York County Court of Common Pleas, finding that the lower court erred in denying the goal change and placement petitions of York County Children and Youth Services (CYS) when the needs and welfare of the child mandated that mother’s parental rights be terminated. In support of its decision, the court found that mother had made minimal progress toward the goal of reunification as she was still unable to have unsupervised custody of R.M.G. or maintain a safe home for herself and the child, despite receiving appropriate services from CYC for three years. As such, the record established that there was clear and convincing evidence to abandon the goal of reunification and the lower court’s failure to do so was an abuse of discretion.

The relevant facts and procedural history of this matter are as follows: Mother is the biological parent of three minor children. When mother’s oldest child, K.R., was 5 months old, mother shook him violently until he stopped breathing, leaving the child in a vegetative state. As a result, mother’s parental rights to K.R. were terminated and she was convicted of aggravated assault as defined pursuant to 18 Pa.C.S. §2702. Mother served almost six years in prison for this offense. In April 2004, mother was released from prison and placed on parole. As a condition of her parole, she was not to have any unsupervised conduct with children. Despite this directive, mother became pregnant with her second child, J.M.M., in 2006. Upon his birth, J.M.M. entered placement with CYC and was declared dependent shortly thereafter.¹ Approximately one year later, mother became pregnant with the child at issue, R.M.G. Five days after her birth, R.M.G. also entered CYC custody and a dependency hearing was held on Nov. 1, 2006.

At the Nov. 1 dependency hearing, despite the court’s finding that sufficient grounds for termination existed, the court set the family goal at reunification. The court also

ordered that mother satisfy certain criteria in order to achieve this goal. That criteria included maintaining appropriate housing, undergoing drug and alcohol testing, and attending weekly supervised visitation with R.M.G. Pursuant to the court’s decision, CYC created a family service plan (FSP), which, in addition to complying with the court’s order, required that mother secure employment, maintain her household expenses, participate in parenting classes and otherwise comply with CYC’s policies and procedures.

After the dependency hearing, the court held five permanency review hearings over a two-year period. At each hearing, the court found that although CYC had made reasonable efforts to provide mother with the services that she needed in order to satisfy the Nov. 1, 2006 order and the FSP, she was, at best, making minimal progress toward reunification with R.M.G. As a result of mother’s continued lack of progress, CYC filed petitions for goal change and involuntary termination of mother’s parental rights to R.M.G. pursuant to 23 Pa.C.S.A. §2511(a)(9) on Sept. 16, 2009. Section 2511(a)(9), states, in relevant part, as follows:

§2511. Grounds for involuntary termination.

(a) General rule. — The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

...

(9) The parent has been convicted of one of the following in which the victim was a child of the parent:

(ii) felony under 18 Pa.C.S. §2702 (relating to aggravated assault).

See In Re R.M.G. 997 Ad. at 348-349.

In support of its petitions, CYC alleged, *inter alia*, that “Mother lacked the ability to make safe, appropriate decisions for herself and her children” and thus it was not in the best interest of R.M.G. to be returned to mother’s custody. *See id.* at 343. The petitions also noted that father was not a resource for R.M.G., as he was incarcerated for assaulting mother.²

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Elizabeth Billies is an Associate in the Lansdale firm of Dischell, Bartle, Yanoff & Dooley and a member of the Family Law Sections of the Montgomery County Bar Association and the Pennsylvania Bar Association.

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York County Judge Chronister held a hearing regarding CYS's petitions on Aug. 5, 2009. The parties stipulated that mother had been convicted of aggravated assault and that this fact was an aggravated circumstance and grounds for termination pursuant to 23 Pa.C.S.A. § 2511 (a) (9). The parties agreed that the central issue was whether it was in the best interests of R.M.G. to be reunited with mother or for mother's rights to be terminated and for R.M.G. to be adopted. CYS's main witness was R.M.G.'s caseworker, Tara Deane. Deane testified that mother "was not yet ready to assume custody of R.M.G. because of mother's penchant for abusive relationships and failure to demonstrate she was capable of keeping the children safe." *See id.* at 344. Deane opined that the goal change to termination and adoption was in the best interests of R.M.G. as it would provide the child, who had been in the foster care system since 2006, a sense of permanency. Deane testified that R.M.G. had developed a strong bond to J.M.M. and their foster mother, whom she called "mom." In contrast, mother testified that she was ready to take full custody of R.M.G. During her testimony, she described her positive interactions with R.M.G., her compliance with the FSP and her successful management of her anger issues. On Aug. 24, 2009, the court entered an order denying CYS's petitions and maintaining the goal at reunification. This appeal followed.

In addressing its appeal, CYS framed the central issue as follows: Did the lower court err in failing to change the goal from reunification to termination when there was clear and convincing evidence that such a change was in the best interests of R.M.G.? The court answered this question in the affirmative.

Judge Gantman began the Superior Court's decision reviewing the Juvenile Act, which controls the disposition of dependent children. *See* 42 Pa.C.S.A. §6351 *et seq.* It is the agency's burden to show that a goal change is in the best interests of the child. *See In re: R.M.G. at 347.* "Safety, permanency, and the well-being of the child" are paramount to all other factors listed in the act, including the rights of the parents. *See id.* If a parent has made some progress toward reunification, this will not necessarily prevent a goal change from reunification to termination and adoption when the best interests of the child indicate otherwise. *See id.*

After providing a global overview regarding the law on reunification and termination, the court focused on 23 Pa.C.S.A. §2511 to find that the continued goal of reunification was not in R.M.G.'s best interests. Section 2511 provides a two-part test for determining whether a parent's rights should be terminated. *See id.* at 348. First, the court must examine whether the parent's conduct satisfies the grounds

for termination set forth in Section 2511(a). If so, then the court shall conduct a factual analysis as required pursuant to Section 2511(b) to determine whether the child's needs and welfare will be satisfied by termination. If both parts have been satisfied, a request for termination must be granted.

Following this explanation, the court applied this two-part test to the case at bar, finding that it had been satisfied. The court quickly determined that Section 2511(a) had been met as the parties had previously stipulated to mother's conviction of aggravated assault against K.R. as an aggravated circumstance and sufficient grounds for termination. The court then turned to the assessment required pursuant to Section 2511(b). The court found that the record did not support the lower court's findings that mother had met the reunification goals or that reunification remained in the child's best interest. The court specifically rejected the lower court's determination that CYS failed to provide appropriate programming to assist mother in her reunification with R.M.G. Rather, the court found that CYS made reasonable attempts to help mother in her goal and that it was mother's minimal efforts to satisfy the reunification criteria that prevented her from gaining custody of her child.

The Superior Court then set forth specific facts that supported its decision that the needs and welfare of R.M.G. mandated termination of mother's parental rights. First, the court found that despite receiving CYS services for almost three years, mother had not developed sufficient skills to have unsupervised custody of R.M.G. for even a short period. *See id.* at 351-352. The records indicate that she had not properly addressed her anger management skills and was unable to set boundaries for R.M.G. during their visitations. Second, the court emphasized that mother's tolerance for domestic violence, including her tumultuous relationship with R.M.G.'s father, cast serious doubt on mother's ability to provide a safe home for the child. *See id.* at 354-355. In contrast, R.M.G. had a stable and loving home with her foster mother and brother, J.M.M. *See id.* at 355. Thus, the court found that there was clear and convincing evidence that returning R.M.G. to the custody of mother was not in her best interest and the lower court's refusal to terminate mother's rights was an abuse of discretion.

¹ Mother's parental rights to J.M.M. were terminated in January of 2008 and were not at issue in this appeal.

² Father subsequently consented to the termination of his parental rights and the adoption of R.M.G.

BALICKI: TAX RAMIFICATIONS AND COSTS IN EQUITABLE DISTRIBUTION BY MICHAEL E. BERTIN, ESQ.

BALICKI V. BALICKI 4 A.3d 654 (Pa. Super. 2010)

The recent case of *Balicki v. Balicki* has sent shock waves throughout the family law community. The question family law practitioners face is whether the *Balicki* decision mandates the court to apply tax ramifications and the costs of sale to all assets when equitably dividing the marital estate.

In 2005, the Pennsylvania Divorce Code was amended. Section 3502 pertains to equitable division of marital property. The following two subsections (10.1 and 10.2) were added to Section 3502(a): “(10.1) The Federal, State, and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain” and “(10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.”

Section 3502(a) states, in part: “the court shall equitably divide ... the marital property between the parties ... after considering all relevant factors ... factors which are relevant to the equitable division of marital property include the following [13 factors which include 10.1 and 10.2].” At the time the Divorce Code was amended in 2005, family law practitioners debated as to whether subsections 10.1 and 10.2 had to be “applied” in all cases or merely “considered.” It appeared that subsections 10.1 and 10.2 would be considered and applied on a case-by-case basis.

Prior to the 2005 Amendments to the Divorce Code, Section 3502(a)(10) read as follows: “The economic circumstances of each party, including Federal, State and local tax ramifications, at the time the division of property is to become effective.” The Pennsylvania Supreme Court case of *Hovis v. Hovis* was handed down shortly after the 1988 Amendments to Divorce Code became effective. The 1988 Amendments added the language to Section (a)10 pertaining to tax ramifications. The Supreme Court in *Hovis* held that “potential tax liability may be considered in valuing marital assets only where a taxable event has occurred as a result of the divorce or equitable distribution of property or is certain to occur within a time frame such that the tax liability can be reasonably predicted.” The 2004 Official Comment to Section 3502

stated: “Notwithstanding the legislative statement in the 1988 amendments, and perhaps because the *Hovis* opinion was handed down after the amendments had become effective (but clearly decided under pre-amendment law), lower court cases after *Hovis* have required tax ramifications to be immediate and certain in order for them to be considered in equitable distribution. New subsection (a)(10.1) seeks to change this interpretation by making clear that tax ramifications are relevant and need not be immediate and certain.”

In the recent case of *Balicki*, (Allen, Colville and Cleland, JJ.) the parties were married for 26 years when they separated. Wife was a homemaker and husband was a part owner of a family insurance company and shareholder in a Pittsburgh law firm. Wife filed a divorce action against husband in Allegheny County and a four-day equitable distribution master’s hearing was held. Because Allegheny County follows Rule 1920.55-2, the master’s hearing was a record hearing. Master Patricia G. Miller (appointed by Judge Kaplan prior to his retirement) awarded, *inter alia*, wife 65 percent of the marital estate plus alimony. In valuing the marital estate, contrary to husband’s request, the master did not reduce the value of the insurance company in which husband had an ownership interest because it was a second-generation family business, and the parties’ children, who were now adults, “may some day inherit the business as [H]usband did.” In her report and recommendation, the master valued the marital portion of the business to be \$610,590. Husband filed exceptions to the master’s report and recommendation with the trial court.

The trial court (Hertzberg, J.) granted “most” of husband’s exceptions and, among other things, lowered “the marital value of husband’s insurance agency from \$610,590 to \$469,655 to account for the tax ramifications and expenses of sale. ...”

Both parties appealed the trial court’s ruling on numerous grounds. The Pennsylvania Superior Court affirmed the trial court’s decision to reduce husband’s interest in the insurance company to account for the tax ramifications and expenses of sale. The standard of review regarding an order of equitable distribution is “whether the trial court abused its discretion by a misapplication of the law or failure to follow proper legal procedure.” An abuse of discretion “requires a showing of clear and convincing evidence.”

The Superior Court provided a reminder that “in determining the propriety of an equitable distribution award, courts must consider the distribution scheme as a whole,” and measure it “against the objective of effectuating economic justice between the parties. ...”

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In its opinion, the trial court indicated that it believed “it is crystal clear that the Legislature intended to stop the practice of the lower courts analyzing the prospect of sale of an asset ... [and] believe the Legislature intends the assets simply be given the value they would have at distribution after deducting every expense necessary to achieve liquidation.” The trial court in its opinion also indicated that Wife *correctly* argued that the statute “requires [the court] only to *consider* the tax ramifications and expense of sale along with numerous other listed factors, but the Divorce Code does not make a deduction for them mandatory.” (emphasis in original).

Husband’s interest in the business was the largest asset in the marital estate. The distribution scheme included wife receiving a large payment from husband, while husband retained his interest in the business. The trial court indicated that husband retaining his interest in the insurance business was “much different” than wife receiving a cash payment, and if husband desired to convert his interest in the business to cash, he would have to incur income tax, a broker’s commission, finder’s fee, attorney’s fees and accountant’s fees. Because of this, the trial court reasoned that deducting the tax ramifications and expense of sale from the value of the busi-

ness was appropriate. On appeal, wife claimed that the trial court “usurped the fact-finding function and credibility determinations of the master.” The Superior Court did not agree and held that the “record does not support the Master’s conclusion that Husband would not sell the family-held insurance agency.” As such, the Superior Court held that wife’s claim was without merit and affirmed the trial court on that issue on appeal. It is to be noted that the Superior Court also affirmed the trial court’s tax affecting the alimony award.

The *Balicki* decision appears not to have settled the debate of “consider” vs. “apply” the tax ramifications and expense of sale to all assets when equitably dividing the marital estate. Can a court “consider” the tax ramifications and expense of sale without same being calculated? If the tax ramifications and expense of sale are to be calculated for every asset in a marital estate, it will be a very costly endeavor for the litigants as experts will be needed in many situations. Once they are “considered” do the values of the assets have to be reduced accordingly? It appears that arguments for both sides continue to exist. Regardless, practitioners and the court must focus on and analyze the *Balicki* decision in equitable distribution matters.

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Comments:

SPECULATIVE OR NOT, INDEFINITE TAX RAMIFICATIONS MUST BE CONSIDERED BY CATHERINE M. MCFADDEN, ESQ.

In *Balicki v. Balicki*, 4 A.3d 654 (Pa.Super. 2010), the Superior Court made it clear that Pennsylvania has joined a nationwide trend allowing consideration of indefinite tax ramifications and costs of sale in equitable distribution. The decision also:

- Highlighted some of the factors that should be considered in determining whether to make an adjustment for indefinite tax impact and costs of sale.
- Held that where the court properly considered tax ramifications and sale costs that would be incurred if husband were to sell his interest in a family-owned insur-

ance agency, the court also properly considered the tax consequences of an alimony award to wife, even though this was not an issue raised on exceptions by either party.

- Affirmed a decision to adjust wife’s share of the marital estate from 65 percent to 60 percent, based in part on consideration of husband’s voluntary payment of 100 percent of the college expenses for the parties’ two children, as well as on consideration of husband’s payment of other debt and wife’s accumulation of savings during separation.

The parties were married in 1979 and separated 26 years later in 2005. Wife is a high school graduate who was primarily responsible for care of the parties’ two children and

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homemaking duties during the marriage. Husband has an interest in a family-owned insurance agency and is a shareholder in a Pittsburgh law firm. During the support proceedings, husband's expert testified that husband's income was \$21,000 net per month. By the summer of 2006, both children had reached 18 and finished high school. Wife was working as an optician's assistant with gross income of \$19,900 per year. Wife was awarded spousal support of \$7,407 per month.

The marital estate was worth \$1,050,631 net of debt. The most valuable asset was the marital portion of husband's interest in the insurance agency, valued at \$610,590 before consideration of liquidation expenses and \$469,655 after consideration of these expenses. The next three most valuable assets were:

\$231,975	Marital residence
\$168,991	Marital portion, husband's 401(k)
\$ 63,922	Commercial office building

Other assets included life insurance, some savings and investments divided by advances during separation, various vehicles and personal property.

Special Master Patricia Miller recommended that wife receive 65 percent of the marital estate and that husband be required to pay wife \$560,096 in three installments, the last due within one year. The master also recommended that husband be required to pay alimony of \$7,407 per month for one year (until husband made the last installment payment in equitable distribution) and then alimony of \$5,540 per month for 10 additional years until wife reached age 62. The master did not deduct liquidation expenses from the value of the insurance agency.

Husband filed exceptions and wife filed cross-exceptions. Judge Alan Hertzberg decreased the cash payment due wife from \$560,096 to \$405,557. The amount of the payment was based on adjusting the percentage division to 60 percent; valuing husband's interest in the insurance agency at \$469,655 to take into account liquidation expenses; and reducing the value of the household goods in husband's possession from \$24,000 to \$8,000. The trial court also directed that the \$5,540 alimony payment begin immediately and continue for 11 years. Both parties appealed, and the Superior Court affirmed. The panel members were Judge Cheryl Lynn Allen, who wrote the opinion, together with Senior Judge Robert E. Colville and Senior Judge John M. Cleland. Wife was represented by Christine Gale of Frank, Bails, Murcko, Gubinsky & Gale P.C. Husband was represented by Lisa Petruzzi of Feldstein Grinberg Stein and McKee P.C.

Consideration of Tax Ramifications and Sale Expenses in Equitable Distribution

Section 3502(a)(10.1) of the Divorce Code requires the court to consider tax ramifications associated with each marital asset, "which ramifications need not be immediate or certain." Section 3502(a)(10.2) requires consideration of the expenses of sale of an asset, "which expense need not be immediate or certain." The direction to consider tax ramifications and sale expenses even if not "immediate or certain" was added to the Divorce Code in 2004, effective Jan. 28, 2005. The Joint State Government Commission comment says the amendment is intended to change the practice of declining to consider tax ramifications unless immediate and certain.

While *Balicki* makes it clear that the amendments mean what they say, it would be a mistake to conclude that the case stands for the proposition that tax ramifications and sale expenses must be quantified and deducted from the value of every asset. The discussion in *Balicki* about this issue consists almost entirely of quotation from the trial court opinion. One sentence in that opinion seemingly supports an assertion that the deductions are mandatory:

We believe the Legislature intends the assets simply be given the value they would have at distribution after deducting every expense necessary to achieve liquidation.

However, the opinion goes on to acknowledge that the plain language of the statute does *not* mandate deduction of liquidation expenses in every case:

Wife also argues, correctly, that the statute requires us only to consider the tax ramifications and expense of sale along with numerous other listed factors, but the Divorce Code does not make a deduction for them mandatory.

In addition, the opinion points out specific circumstances in the case justifying the decision to deduct taxes and sale expenses from the value of husband's interest in the insurance agency, including differences in the types of assets awarded to each party and the associated significant differences in the amount of liquid assets owned by each party.

How to address tax consequences and sale expenses is a developing area of equitable distribution law not only in Pennsylvania, but also across the nation. In *Equitable Distribution of Property 3D*, published in 2005, shortly after amendment of the Pennsylvania Divorce Code, author Brett Turner noted:

When the second edition of this treatise was written in 1993, a majority of states did not permit any consideration of indefinite future tax consequences.

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Since that time, the popularity of the majority rule has steadily weakened.

(Brett R. Turner, *Equitable Distribution of Property 3D*, Thomson West, Danvers, MA, 2005, § 8.29, p. 918)

Turner describes the competing policy concerns. On one hand, indefinite future tax consequences and sale expenses are speculative. An asset might be sold within one year or 50 years of the parties' divorce. The asset might never be sold. As noted in *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378, 1380, n. 5 (1988), federal income tax rates ranged between 14 percent and 50 percent under pre-1986 law, and between 15 percent and 28 percent after 1987. In the 10 years preceding *Hovis*, capital gains rates ranged from 7 percent to 49 percent. Turner observes that under these circumstances, a mandate requiring quantification and deduction of liquidation expenses from the value of every asset would call to mind the legendary attempt in 1897 by the Indiana House of Representatives to legislate the value of *pi*, allowing citizens to choose between three incorrect values: 3, 3.23 or 4. (Turner, *supra*, at 920) The plain language of the amendment to the Divorce Code does *not* mandate deduction of tax impact without considering the likelihood of sale, and were such a mandate enacted it would legislate incorrect results in some cases.

On the other hand, a \$100,000 certificate of deposit and a \$100,000 IRA are not equivalent and should not be treated as the same in equitable distribution. It may not be possible to predict the exact amount of tax liability that will be generated by the IRA, but exactitude and avoidance of *all* speculation is not required in valuation and distribution of marital property. For example, courts commonly consider disparities in the parties' income as a significant equitable distribution factor, without concern that this is to some degree a speculative endeavor. The breadwinner spouse may become ill or injured or lose the superior stream of income for other reasons. The homemaker spouse may get a better job, win a large sum of money or marry a wealthy second spouse.

Tax consequences do not always need to be quantified to be equitably considered. One of the simplest techniques is to acknowledge that a \$100,000 certificate of deposit and a \$100,000 IRA are not equivalent and to distribute a portion of each of the two assets to each of the parties.

A technique that avoids speculation both about whether or which asset will be sold and about the amount of tax impact and sale costs is for the court to direct sale of specific assets to effectuate a property distribution instead of leaving the decision about what to sell in the sole discretion of

one of the parties and instead of deducting tax ramifications and sale costs from an asset that might never be sold. In *Balicki*, the court noted that husband had various opinions for funding the \$405,557 payment to wife. Husband could sell his \$469,655 marital interest in the insurance agency; sell the marital residence to obtain net proceeds of \$232,000; borrow \$62,000 from the non-marital portion of his 401(k) plan; or sell his commercial real estate to obtain \$128,000 of net proceeds. Since the insurance agency was a business that had been in husband's family for two generations, and since the parties had adult children who might someday inherit husband's interest, sale of the business seems to be less likely than sale of the house and commercial real estate. Another option would have been to direct husband to make his installment payments over a longer period of time to avoid the necessity of selling assets and incurring taxes and sale expenses.

Unquantified or indefinite tax ramifications also can be considered a factor in determining the percentage division, with less weight on highly speculative consequences, greater weight on more certain consequences and appropriate weight on all other division factors. For example, the outcome in *Balicki* could be viewed as a 53-percent distribution to the homemaker spouse of a marital estate worth \$1.19 million, with the tax consequences and sale costs added back. The 53-percent distribution places great weight on tax consequences as a division factor based on a conclusion that husband would have to actually sell something — whether his ownership interest in the insurance business or some other asset — to fund his equitable distribution obligation to wife, and because wife would be left with significant liquid assets and husband with no significant liquidity. A Missouri court found a 60-percent distribution to the husband reasonable where the husband was receiving assets that came with a potential tax burden due to accelerated depreciation taken during marriage. *Elrod v. Elrod*, 192 S.W.3d 738 (Mo. Ct. App. S.D. 2006)

In some cases, a requirement that tax impact be quantified under present law and deducted from the value of each asset could lead to bad outcomes. If the parties are 40-years old and both are self-supporting, there is no reason to think that one of them will liquidate the IRA and incur a 10-percent penalty. Deduction of the penalty from the value of the IRA under these circumstances would be irrational. In other situations, future tax impact is likely to be greater than present tax impact, because the party selling the asset is likely to have greater income in the future. As Turner observes:

To insist that two assets with identical values but materially different tax bases must be treated as equal is absurd. It is equally absurd, however, to insist that future tax consequences are *never* speculative, or to insist that the court consider the tax

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effect of an immediate sale even though that sale is the one event which is almost certain *not* to happen. Where the indefinite future tax liability can be predicted with accuracy similar to the accuracy of the projections used to value retirement benefits, businesses and other assets, the amount of that liability should be one relevant factor considered in dividing the marital property.

(Turner, *supra*, at 931; emphasis added)

Consideration of Alimony Tax Ramifications

To calculate the \$5,540 alimony award, Special Master Miller imputed to wife 4-percent tax-free income on the \$560,096 equitable distribution award, found wife's net income from employment to be \$1,445 and found wife's reasonable needs to be \$8,635 per month. Judge Hertzberg reduced wife's reasonable needs by \$850 per month to \$7,785, but found that wife would pay taxes of at least \$775 per month on the alimony. The judge also noted that his reduction in the equitable distribution award would reduce the amount of interest income wife could generate on that award by about \$515 per month and accordingly determined that no adjustment should be made to the \$5,540 award.¹

The master did not calculate tax impact on the alimony, and wife did not file exceptions on this point. It appears that Judge Hertzberg did not have any evidence about the amount of the tax impact. The judge could have declined to address the tax impact or he could have directed the parties to provide calculations to him. However, he decided to address the matter and he estimated the tax on the \$66,480 annual alimony at 14 percent. He selected 14 percent because wife paid 14 percent of her employment income in federal, Social Security and Medicare tax. The judge acknowledged that this approach likely understated the tax impact. (Using SupportCalc to perform the computation suggests that the judge is correct that his estimate is on the low side, and the actual tax impact is in the range of \$1,200 per month.) The Superior Court found no error in the *sua sponte* consideration of alimony tax impact, particularly in a case where there also was consideration of tax impact in equitable distribution.

Husband also asserted on appeal that the amount of the alimony was so high that it would make it impossible for him to perform his equitable distribution obligation. Judge Hertzberg noted that husband was neglecting to take into account his alimony tax deduction in calculation of the net income available to him, and was disregarding the possibility of selling some of his assets.

The Superior Court has left no real room to question whether tax ramifications should be considered in computation of alimony awards. *Balicki* is at least the second case to address this issue since the Divorce Code was amended. In *Smith v. Smith*, 904 A.2d 15, 2006 Pa. Super. LEXIS 1617, the Superior Court remanded the alimony portion of an Indiana County Court order because there was no indication from the record that tax ramifications were considered in determining the amount necessary to meet the wife's reasonable needs.

Voluntary College Tuition Payments and Other Equitable Distribution Considerations

The court in *Balicki* considered at least two financial circumstances that are not specifically listed in the equitable distribution factors in Section 3502(a) of the Divorce Code. One was the extent of liquid assets available to each of the parties and the other was husband's voluntary payment of 100 percent of the two children's college expenses. Both of these circumstances could be considered under Section 3502(a)(10), which requires review of the economic circumstances of each party at the time the division of property is to become effective. Both of these also could be considered as part of the general direction of the statute to consider all relevant factors.

Equitable distribution statutes in other states do not generally expressly mention liquidity, but substantial law from other states permits liquidity to be considered. In some cases trial courts have been reversed for failure to leave one of the spouses with sufficient liquid assets. (Turner, *supra*, § 8.32 at 939) In other cases, a disparity in the distribution of liquid assets justifies a disparity in the overall percentage distribution. For example, in *Long v. Long*, 135 S.W.3d 538 (Mo. Ct. App. S.D. 2004), the court affirmed a distribution of only 18 percent of the liquid assets to the husband where the husband received nearly 57 percent of the marital estate. It seems inarguable that Judge Hertzberg appropriately focused on and considered the extent to which wife would be left with cash assets and on the relative difficulty that confronted husband in producing the cash payment due.

The consideration of college expenses is a slightly more difficult issue, at least in Pennsylvania, where a statute permitting court orders requiring separated parents to contribute to their children's college expenses has been found unconstitutional. *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995). If neither parent can be required to contribute to the support of a child in college, how can it be permissible to make a judgment about the level of each parent's contribution and adjust equitable distribution or alimony awards based on a conclusion that one parent's contribution is insufficient? Suppose a parent represents that he will pay 100 percent of the expenses,

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but then fails to do so? Unless the obligation can be enforced, both the college student and the other spouse may be harmed without recourse.

Courts across the nation disagree about whether it is appropriate to consider voluntary child support as a factor in equitable distribution. (*Turner, supra*, § 8.22 at p. 887) The husband's payment of college expenses for the parties' child was mentioned as a distribution factor in an Illinois case. *In re Marriage of Jones*, 187 Ill App. 3d 206, 134 Ill Dec. 836, 543 N.E.2d 119 (1st Dist. 1989). However, unlike Pennsylvania, Illinois allows support orders to issue for children in college. 750 ILCS 5/513; *Blisset v. Blisset*, 123 Ill. 2d 161, 121 Ill. Dec. 931, 526 N.E.2d 125 (1988). The fact that Illinois allows college support orders may be significant, because another Illinois court found that it was error to consider the needs of the parties' quadriplegic adult child in equitable distribution as the parties had no legal obligation of support. *In re Marriage of Riech*, 208 Ill. App. 3d 301, 152 Ill. Dec. 949, 566 N.E.2d 826 (4th Dist. 1991)

Consideration of payment of college expenses in equitable distribution or alimony decisions is appealing from a number of standpoints. The reality is that loving parents contribute to the college expenses of their children. The Pennsylvania family court caseload includes a wealth of parents who planned throughout their marriage to contribute to the college expenses of their children and who will keep that commitment no matter what happens in equitable distribution and alimony. It seems wrong to turn a blind eye to the manner in which a major expense is paid simply because neither party can be forced to pay that expense.

While wife did appeal Judge Hertzberg's decision to award her 60 percent rather than 65 percent of the marital estate, nothing in the Superior Court opinion suggests that wife specifically raised consideration of husband's payment of college expenses as a major or central issue. The word *college* only appears twice in the entire Superior Court opinion. The first reference is a quotation of Judge Hertzberg's opinion, which mentions husband's payment of college expenses and other liabilities in connection with the percentage division. The second reference is the Superior Court's statement that, "Even ... acknowledging that Husband's payment of college expenses is voluntary, we cannot conclude that the trial court committed an error of law or abused its discretion in slightly reducing the division of the marital estate." Accordingly, some trial courts may read *Balicki* as approving consideration of college expenses in equitable distribution decisions, and others may view the language as verging on *dicta*.

Conclusion

The *Balicki* decision is important because it leaves no room for doubt that Pennsylvania has joined a nationwide trend allowing consideration of indefinite future tax consequences, even if many questions about how to consider such tax consequences appropriately remain to be addressed in future cases presenting different facts. *Balicki* also is important because it is a good example of the process of careful consideration of numerous factors and the individualized approach that should be taken in equitable distribution and alimony cases.

Reasonable people can disagree about the outcome at the bottom line in *Balicki*. Some might argue that a 60 percent distribution to wife with the value of the insurance agency tax-impacted was insufficient in view of the value of husband's separate property, including a \$530,000 separate interest in the insurance agency and a \$62,000 separate interest in his 401(k) plan. Others might respond that requiring husband to pay wife \$405,557 within one year bordered on impractical, or awarding 11 years of alimony after a 26-year marriage is too much. However, figuring out equitable distribution and alimony awards is not a science. These decisions require a careful consideration of numerous factors in a disciplined effort to tailor a fair result to the individual circumstances of each case, together with a sense of balance and proportion preventing unnecessary focus on detail. Predictability and uniformity are important, but care must be taken to adjust outcomes to varying individual circumstances. In *Balicki*, expense forms were examined. Actual income, including income that would be generated by assets distributed to the parties, was calculated. The types of assets distributed to each party were scrutinized. Husband's protestations of inability to pay all the equitable distribution and alimony awarded to wife were considered in a practical way. The court's reasons for its award were explained. All in all, *Balicki* is a good illustration of a carefully-presented and carefully decided equitable distribution and alimony case.

¹ Judge Hertzberg halved wife's \$700 per month clothing expense to \$350 per month and eliminated her IRA expense of \$500 per month, finding that the equitable distribution award to wife of \$168,991 from husband's retirement plan and \$405,557 in cash sufficiently provided for wife's retirement. Wife apparently testified at trial that she was able to pay all of her bills with the \$7,407 of spousal support and her employment income, plus have money left over to save. Husband raised additional issues about wife's expenses on appeal, but the Superior Court declined to address these issues because they were not raised in husband's Rule 1925(b) statement.

Articles:

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DISCIPLINE OF PENNSYLVANIA PSYCHOLOGISTS RELIES UPON AN UNLAWFUL DELEGATION OF RULEMAKING AUTHORITY BY HON. DAVID N. WECHT AND JENNIFER H. FORBES, ESQ.

In 2003, the Commonwealth Court held that a Pennsylvania-licensed psychologist was properly subject to disciplinary measures by the State Board of Psychology based upon that board's conclusion that he had violated a standard promulgated by the American Psychological Association.¹ The psychologist asserted that it was improper for the board to delegate to the APA this kind of rulemaking authority through enforcement of APA's own standards.² The Commonwealth Court dismissed that argument summarily, stating simply that "[t]he Board complied with the General Assembly's statutory directive."³ The court did not address the delegation issue. This article does. Specifically, may a commonwealth agency delegate authority to a non-governmental association to enact "codes" or "standards" that the agency will then enforce?

Facts of the Case

Jan C. Grossman, Ph.D., was hired in 1996 by the mother in a custody dispute to review and critique the court-appointed psychological evaluator's report.⁴ Grossman asked the mother's attorney to obtain the father's consent for Grossman to meet with the minor child, but apparently consent was never obtained.⁵ Nonetheless, Grossman met twice with the child. One of the meetings occurred after the father called Grossman to object to any such interview, although Grossman asserted that the father did not stop him from seeing the minor child.⁶ Grossman also testified at the custody trial.

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In 2000, Grossman received notice that the board was considering disciplinary proceedings.⁷ Count I of the notice alleged that Grossman had violated the board's regulations, 49 Pa.Code § 41.61, Principle 3(e), because Grossman "deviated from the [APA] standards and guidelines when he conducted a psychological evaluation and/or met with [the child] without the knowledge or consent of her father."⁸

The board found that Grossman violated Guideline 9 of the APA's Guidelines for Child Custody Evaluations in Divorce Proceedings. That guideline states: "The psychologist obtains informed consent from all adult participants, and, as appropriate, informs child participants."⁹ Grossman appealed the board's decision to the Commonwealth Court. As noted, the court affirmed the finding against Grossman.¹⁰

Delegation

Article 2, Section 1 of the Pennsylvania Constitution vests legislative power in the General Assembly. The General Assembly cannot delegate its law-making power. But it may "confer authority and discretion in connection with execution of law," and "may impose upon others the duty to carry out declared legislative policy in accordance with general provisions of [an] Act."¹¹

In general, there are two species of delegation that the General Assembly can create: status-finding legislation and rule-making legislation. Status-finding legislation is a "statutory statement of policy by the legislature to become operative only upon the finding by an administrative agent that a

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described status exists.”¹² For example, the Drug, Device and Cosmetic Act defined a narcotic drug as, among other things, any drug found by the U.S. Secretary of the Treasury to be addictive.¹³ This type of delegation is not considered improper or overbroad, and courts have only required a description of the status to be found, rather than detailed standards.¹⁴ The Supreme Court of Pennsylvania long ago explained why this type of delegation is allowed:

The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law making power, and must, therefore, be a subject of inquiry and delegation outside the halls of legislation.

Locke's Appeal, 72 Pa. 491, 498 (1873).

The second kind of delegation is rule-making legislation. This is defined as legislation that states a general policy, “but gives the administrative agent, within limits set by express standards, the power to fill in details of policy with regulations.”¹⁵ To avoid impermissible delegation, courts require clear standards in the legislation.¹⁶ The administrative authority must be specified by “clear and unmistakable language.”¹⁷ The Pennsylvania Supreme Court has held that the Legislature may confer authority on another body if the Legislature has made the basic policy choices and the “legislation [contains] adequate standards which will guide and restrain the exercise of the delegated administrative function.”¹⁸ Courts recognize that conferring rule-making authority on administrative agencies is widely practiced and that “it should be upheld whenever the statutory delegation can reasonably be construed to authorize it.”¹⁹

Delegation to Third Parties

But the *Grossman* case, involving a delegation to the Board of Psychology, which then adopted and enforces American Psychological Association standards, takes us further. To examine that delegation, we must refer to cases that involved allegations of unlawful delegations to third parties. There have been few.

In one case, a physician’s group challenged a section of the motor vehicle law, claiming that the law impermissibly delegated to federal officials and a private party the determination of mandated caps on fees for the treatment of motor vehi-

cle accident victims.²⁰ The physicians alleged that power had been delegated to an insurance company to determine the compensation caps based on Medicare rates. However, the court found that the power to make law and policy had not been delegated and that the insurance company had only the power to assist in determining reasonable medical charges.²¹

Few cases deal specifically with delegation to a private party. In one federal case, the renewal of a cigarette stamping agent was denied because the applicant did not meet the requirement that he have a commitment from at least two manufacturers with an aggregate market share of 40 percent.²² The federal district court found that this was an impermissible delegation of legislative authority to a private party in violation of the Pennsylvania Constitution because it involved approval of a private party as a prerequisite for public action.²³ The court stated that the Legislature could not hand over control to private parties “uncontrolled by any standard or rule, not bound by any official duty [and] free to withhold consent for selfish reasons or arbitrarily.”²⁴ In a state case, a requirement that applicants attend a two-day conference put on by the Pennsylvania Chiropractic Society, Inc. or an equivalent educational seminar approved by the Board of Chiropractic Examiners for license as a chiropractor was found to be an impermissible delegation.²⁵ The Supreme Court found that, since the Legislature did not give guidance in the statute, the private group was essentially given the power to determine the requirements for the continuing education of chiropractors. This was an impermissible delegation.²⁶

Delegation as Applied to the *Grossman* Case

The General Assembly authorized the State Board of Psychology to adopt rules and regulations for standards for the professional practice of psychology and to develop a code of ethics.²⁷ The board issued its code of ethics. The code specifically incorporates the APA’s standards and guidelines.²⁸

There seems to be no question that the General Assembly can permissibly authorize the board to develop a code of ethics. A similar statute was upheld as a valid delegation by the Commonwealth Court.²⁹

The question is whether it is permissible for the board to further delegate that authority to the APA. For rule-making delegation to be permissible, there must be clear guidelines to the rule-making body. Clear language should guide and restrain the rule-making ability that is delegated. In this case, the board is acting in the place of the General Assembly, and the APA is acting as the administrative agency. But the board has issued no guidance and no clearly stated guidelines to the APA for the development of a code of ethics. Instead, the board has merely adopted the APA’s guidelines and standards wholesale and without consideration of whether they fit within the guidance of the authorizing statute.

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Even if the board attempted to provide guidelines to the APA for the development of the standards that make up the code of ethics for Pennsylvania-licensed psychologists, the APA, as a private entity, is perfectly free to ignore those guidelines. That is why in the two cases on point, the courts have found it impermissible to delegate rule-making authority to private entities. While it is unlikely that the APA would create standards that were arbitrary (as the federal court feared in the *Santa Fe Natural Tobacco* case), the APA is without question an independent entity that is not bound by any government agency.

The *Grossman* matter is very similar to the *State Board of Chiropractic Examiners* case. In that case, the private entity was found to have been given the power to determine education requirements for chiropractors even though the state board retained the right to approve coursework from other providers for continuing education. Here, even though the board has promulgated its own ethical rules, it has incorporated all APA standards and guidelines. That gives a private entity the power to determine the ethical requirements for psychologists. And that is an impermissible delegation.

As a final, and perhaps unrelated, issue, the regulation would also appear to violate the notice requirement.³⁰ Agency regulations must be promulgated according to notice and comment procedures. These include a public notice of intention to promulgate regulations, acceptance, review and consideration of written comments, legal approval of proposed regulations, and publication of the text of regulations.³¹ This would suggest that any changes to APA guidelines and standards would have to go through notice and comment procedures to become effective regulations. It does not appear that this occurred. Although this is a topic for another article, it does illustrate another pitfall of delegating responsibility to private entities who may change their guidelines without the responsibilities to follow procedures with which government agencies must comply.

The delegation of responsibility for the code of ethics to the APA appears to be an impermissible delegation. The Commonwealth Court should take another look at this issue before other Pennsylvania psychologists are subject to discipline under these rules.

¹ *Grossman v. State Board of Psychology*, 825 A.2d 748, 752 (Pa. Comm. 2003).

² *Id.* at 756.

³ *Id.*

⁴ *Id.* at 750.

⁵ *Id.*

⁶ *Id.* at 750-51.

⁷ *Id.* at 751.

⁸ *Id.* at 752.

⁹ *Id.* at 755.

¹⁰ *Id.* at 763. The court did reverse the board on a fine that was imposed.

¹¹ *Pa. Medical Society v. Foster*, 585 A.2d 595, 600 (Pa. Comm. 1991).

¹² *East Suburban Press, Inc. v. Penn Hills Tp.*, 397 A.2d 1263, 1266 (Pa. Comm. 1979).

¹³ *Comm. v. Tarabilda*, 294 A.2d 830, 832 (Pa. Super. 1972).

¹⁴ *Id.*

¹⁵ *East Suburban Press, Inc.*, 397 A.2d at 1266-67.

¹⁶ *Id.* at 1267.

¹⁷ *Tri-County Industries, Inc. v. D.E.P.*, 818 A.2d 574, 581 (Pa. Comm. 2003).

¹⁸ *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania*, 877 A.2d 383, 418 (Pa. 2005).

¹⁹ *St. Elizabeth's Child Care Center v. D.P.W.*, 963 A.2d 1274, 1277 (Pa. 2009). See also, *Pennsylvania State Association of Township Supervisors v. Thornburgh*, 405 A.2d 614, 617 (Pa. Comm. 1979) (finding constitutionally valid a statute authorizing a regulatory agency to establish ethics rules and regulations). In another case, a newspaper challenged an act that contained the specifications required for a newspaper to carry legal advertisements. *East Suburban Press, Inc.*, 397 A.2d at 1264. The issue was whether requiring that the newspaper be eligible for Second Class mailing privileges as determined by the U.S. Postal Service was an unconstitutional delegation to the postal service. The court found that the delegation was more than status-finding, but that it was not a rule-making delegation that required express standards because "the federal determination has a rational relationship to the state law's subject and purpose, and ... the federal determination deals with a different subject and purpose specifically or exclusively within the federal sphere." *Id.* at 1268.

²⁰ *Pa. Medical Society*, 585 A.2d at 597.

²¹ *Id.* at 600.

²² *Santa Fe Natural Tobacco Co., Inc. v. Judge*, 963 F. Supp. 437, 439 (M.D. Pa. 1997).

²³ *Id.* at 440-41.

²⁴ *Id.* at 441.

²⁵ *State Board of Chiropractic Examiners v. Life Fellowship of Pa.*, 272 A.2d 478, 479, 481 (Pa. 1971).

²⁶ *Id.* at 481.

²⁷ 62 P.S. § 1203.2(2)

²⁸ 49 Pa. Code § 41.61

²⁹ *Pennsylvania State Association of Township Supervisors v. Thornburgh*, 405 A.2d 614, 617 (Pa. Comm. 1979) (finding constitutionally valid a statute authorizing a regulatory agency to establish ethics rules and regulations).

³⁰ *Grossman* did raise a notice issue in his appeal. It, too, was dealt with summarily by the Commonwealth Court. *Grossman*, 825 A.2d at 756.

³¹ *Dept. of Corrections & Dept. of Public Welfare v. Pa. State Corrections Officers Assoc.*, 932 A.2d 359, 367 (Pa. Comm. 2007).

DIVORCE IN ‘THE MOST CRITICAL DECADE’ SUCCEEDING DESPITE THE CHALLENGES AHEAD BY NEIL S. BROWN AND JOAN K. CRAIN, CFP, CTFA, CISP

Overwhelmed by the financial crisis and subsequent ongoing volatility, clients are looking to the future with a view that is clouded by confusion and uncertainty. Fundamental changes have created unprecedented challenges — so many, in fact, that the decade ahead will, in many ways, be the most critical ever.

For those involved in a divorce, the challenges may be particularly pronounced. However, advisors who understand the new planning environment will be able to position their clients to take advantage of opportunities while avoiding the worst pitfalls.

THE NEW PLANNING LANDSCAPE

So what is the “new normal”? To start with, the nature of growth itself has changed. No longer fueled by debt and unbridled spending, growth will be stifled and increasingly influenced by less-reliable factors such as demand-driven exports and unpredictable consumer behavior. Consequently it will be slower, less predictable and harder to attain than it was over the past three decades. Understanding what is reasonable and achievable in a slow-growth environment is especially critical when negotiating divorce settlements and planning a post-divorce lifestyle.

In addition, market volatility and economic dynamics have caused a domino effect. This has resulted in fiscal policy reactions and global headwinds destined to exacerbate the situation. Many traditional assumptions underlying financial plans are outdated. The cost of health care alone will place a significant burden on the economy. And who can predict the impact of higher taxes and financial reform on business development?

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Amid these stark realities, clients are challenged to act effectively. Yet they are likely to feel less confident about taking any action at all. Long-held beliefs in the value of investing and the viability of the financial system have come crashing down. The market collapse of 2008-09 was remarkable not only for the extent of wealth destruction but also for the financial industry’s role in the wreckage. According to CapGemini’s 2009 *World Wealth Report*, 78 percent of surveyed high net worth individuals said they had lost trust in the financial system’s regulatory bodies.¹ Just when successful investing and planning have become more difficult, people have become far less trusting of the financial system and their advisors.

Skepticism and anxiety are understandably heightened for clients going through divorces. Having guided their clients through a protracted and emotionally charged process, family law practitioners can play a unique role in providing wise counsel to clients who are questioning whether plans are sound and budget forecasts realistic or even worthwhile and, most importantly, how to proceed.

Succeeding in the Critical Decade

So what is this “wise counsel”? What should you advise your clients to do? We suggest three keys to success as we move forward.

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Investing in the Critical Decade

First, an enhanced approach to investing will be required. This new approach should reflect investors' recognition of the difference between knowledge and information. As during divorce negotiations, the key to success in the critical decade ahead will be the ability to distinguish major issues from the myriad minor ones that can derail the process. The growing complexity and onslaught of information available to all today make it very difficult for even clear-headed investors to see through the clutter and act on the fundamentals. For clients preoccupied with a divorce, this is often an overwhelming task. As we discuss in more detail later in this article, working with an experienced and skilled advisor who communicates clearly is fundamental to success.

Furthering the need for a professional investment partner is the importance of diversification strategies, the scope and nature of which should be greatly expanded. A long-term, dynamic approach to asset allocation should remain at the heart of any investment program. But the ability and flexibility, for instance, to anticipate and act on market swings or short-term disconnects between and within asset classes has become extremely valuable in capturing opportunities and enabling defensive action.

Consider for example, the huge jump in yields on tax-free municipal bonds compared to U.S. Treasuries in late 2008 and early 2009. Spurred in part by concerns about the solvency of municipal credit guarantors, a tremendous mispricing of municipal securities caused yields to reach historic highs relative to their taxable counterparts. This unusual opportunity may have been brief, but it was long enough for alert investment managers to garner attractive, double-digit rewards during what was a down market for most asset classes.

Of all the investment imperatives for the coming decade, rigorous discipline is possibly the most critical yet most elusive quality. Changing a strategy based on a reaction rather than a reason, for example, is always a bad idea. Glaring examples of this can be found during every stock market decline. Up to three years after the recessions of 73-74 and 08-09, for instance, investors who had capitulated and sold their stocks at the bottom of these bear markets, then jumped back in only six months after the start of the upswing, lagged 15-20 percent behind those who had stayed the course. Unfortunately, the ability to stay focused and committed to a plan is typically the first thing that gets lost in tough times. Conviction, an important underpinning to discipline, is particularly difficult during and after a divorce. The steady influence of trusted advisors is key.

Wealth Planning in the Critical Decade

In addition to an innovative yet disciplined approach to investing, a new mode of planning is required. In past articles, we have stressed the importance of accurate budget forecasts and the urgent need to thoroughly update all estate planning documents during and/or immediately after a divorce. This is even more pressing in today's environment. Despite the lack of clarity in tax and estate law, and myriad other future expenses — in fact, in part because of this lack of clarity — proactive, coordinated and dynamic planning has never been more important.

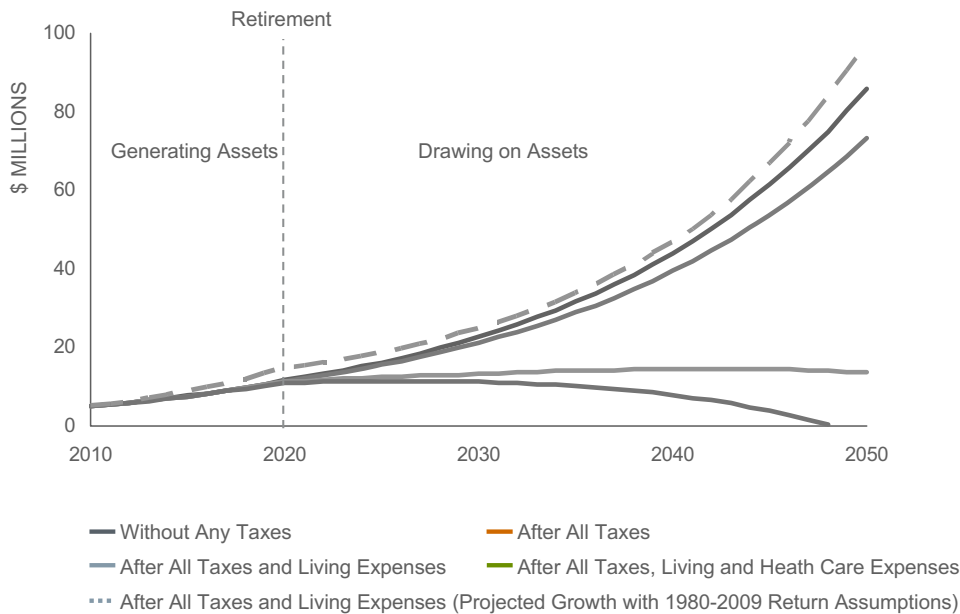
The effects of a transformed investment world, changing rules and higher costs are compounded for divorcing clients by the division of property and need for additional cash flow to support two separate households. At stake is whether clients will have enough money to live on for the rest of their lives and/or to leave a legacy for future generations and philanthropic causes. A nest egg sufficient to last a lifetime has historically been an issue affecting the dependent spouse. However, in today's world of illiquid real estate, shrinking investment portfolios and shaky employment situations, it frequently applies to both sides of the divorcing couple.

One common mistake in projecting future needs is to underestimate the amount required to avoid outliving one's money. Planning must start with complete, realistic income and expense projections. Federal and state deficits make higher taxes an unfortunate reality. Other expenses, including health care, living expenses and inflation, will also rise and remain hard to predict. People are living longer, so they may require more funds than they expected in order to maintain their lifestyles throughout a long retirement. And finally, people often overestimate the future value of their investments, a risk that may be heightened in the coming decade of lower returns vs. those of the past 20 or 30 years.

Despite the absence of total clarity about these and other future concerns, forecasts should be made — and then remade — as circumstances change. Consider a 50-year old planning to retire in 10 years and live on her savings. As illustrated in Exhibit 1, if her \$5 million portfolio were to grow at a conservative long term rate of 7 percent, it would likely exceed \$50 million by the time she was in her mid '80s. But factor in taxes, annual living expenses, inflation and health care costs, and the picture looks much different. Under today's tax scenario, she is likely to run out of money by age 88, as illustrated in Exhibit 1. If taxes go up as expected, she might run out several years sooner. With the proper advice, however, she can anticipate the potential gap and take steps to close it during and/or after the divorce negotiations.

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Exhibit 1



Portfolio Growth under 2010 Tax Policy

Asset allocation based on a 50/50 portfolio, diversified across asset classes. Annual living expenses in retirement are 4% of the portfolio value, increased at an assumed inflation rate of 2.5% per annum. Annual health care costs in retirement are \$20,000 annually, increased at an assumed inflation rate of 6% per annum. Source: BNY Mellon Wealth Management.

Both the husband and wife are each 50 years old. While working, they contribute \$125,000 annually to their initial \$5 million portfolio. They plan to retire at age 60. The couple's blended 50/50 portfolio comprises 29% U.S. large cap equity, 5% U.S. mid cap equity, 2.5% U.S. small cap equity, 7.5% developed international equity, 5% emerging markets equity, 1% commodities and 50% tax-exempt fixed income. Annual return assumptions are approximately 6.9% pre tax and 6.2% after tax.

Effective planning means knowing not only how much will be needed but also when it will be needed and where it will come from. Taking into account all potential sources of income is key. Pensions, IRAs, 401(k)s, stock options and other income sources come in many forms, each with its own unique set of tax, transfer and timing considerations. As discussed in past articles, clients can more effectively optimize the role each source may play in reducing the burden of higher taxes in the coming years if they understand each account's distinct characteristics and future changes that may govern its use.

A total balance sheet view will also be extremely important. While it can be emotionally difficult for some clients to accept, debt can actually be an asset when it comes to planning, particularly in a low-interest or higher-tax environment. For example, an individual who incurs a significant expense — such as a major tax bill, a divorce settlement or an estate tax bill — might be inclined to pay the debt imme-

diately. However, under certain circumstances, such as the current low interest rate environment, the wiser move may be to borrow the required funds. This would preclude having to liquidate part of a portfolio, pay capital gains on the sale and diminish the portfolio's return potential. As discussed in our last article, given many banks' strict lending standards, the key to securing a line of credit or loan today is to work with a flexible lender early in the divorce process. This is especially important when refinancing a home.

A New Quality of Client-Advisor Engagement

Advisors and clients alike will be more successful in the next decade through closer involvement and a greater regard for the contributions each can make to the relationship. Simply stated, they must recognize that enhanced engagement can lead to better results over time.

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As in marriage, a good partnership must flow in both directions. Clients need to be open and direct about communicating with their advisors. They need to understand proposed strategies to ensure they are comfortable with them and do not commit to something that will not suit them when times get tough. No client should ever think a question is too basic to ask. In fact, an advisor's inability or unwillingness to answer a question should be a clear warning signal. However, clients, especially female divorcees, may need coaching to become more involved. Encouragement from an impartial, trusted advisor such as a family law attorney can give these clients confidence.

For their part, advisors also need to communicate clearly, concisely and consistently. Jargon must be eliminated. Terms like *standard deviation*, *alpha*, *beta*, *dispersion*, *mean reversion* and *Sharpe ratio* may have their place, but not in most client conversations. Without clear communication and mutual understanding between advisors and their clients, emotions are apt to overpower rational thinking to disastrous

effect — often when reasoning matters most.

As advisors work to implement investors' plans, they must also recognize the important roles other specialists can play. Collaboration among wealth managers, accountants, attorneys, insurance professionals, business valuation consultants and other experts is necessary for the well-integrated, well-coordinated plans required in today's dynamic world.

CONCLUSION

Investing and wealth planning today is more urgent than ever. With so much in a state of flux, a tendency toward inertia is understandable. But clients need to plan, and plan to keep on planning. Divorce often presents a good — and critical — time to start. By encouraging clients to be informed, nimble and prepared to act, advisors can help them achieve their objectives of wealth accumulation, protection, spending and transfer, not to mention the ultimate goal — peace of mind.

¹ *World Wealth Report 2009*; Merrill Lynch, Pierce, Fenner & Smith Incorporated and Capgemini.

JEWISH HOLIDAY GUIDE FOR CUSTODY/VISITATION SCHEDULES BY ALEXANDRA LEICHTER, ESQ.

Editor's Note: See also "The Effect of Jewish Divorce law on Family Law Litigation," in 32 PA Family Lawyer Issue 91 (June 2010) and "Issues and Solutions Regarding Jewish Premarital Agreements" in 32 PA Family Lawyer Issue 152 (September 2010), both authored by Alexandra Leichter, Esq.,

Most family law attorneys shy away from religious holiday scheduling because they incorrectly assume that the courts are constitutionally prohibited from allocating religious holidays. But the case law often cited¹ does not prevent the court from considering religious practices and observances in devising appropriate time-share arrangements. Those cases merely preclude, absent a showing of "harm," the court from restraining either party from allowing their children's participation in various religious activities or observances.

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Indeed, most appropriately crafted custody and visitation orders apportion Christian and legal holidays in a manner that best suits the parties and the children. There is no reason the same cannot be done with Jewish (or other religious) holidays.

However, Jewish holidays are not easily ascertainable from the Gregorian calendar. The Jewish calendar is a lunar one, with the Jewish New Year corresponding to a day in September or October on the Gregorian calendar, the months have 28 or 29 days, and during leap years an entire month is added to the calendar. Additionally, there are a number of Jewish holidays, which, varying with the degree of religious observance, may or may not be important to the parties. Conflicts in the "level" of holiday observance between parents, or conflicts of Jewish holiday observance between inter-faith couples, make it imperative to learn some basic Jewish holiday issues.

Religiously affiliated Jews in the United States are generally members of one of four branches of Judaism:

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Orthodox, Conservative, Reform and Reconstructionist. The Orthodox, being most traditional, observe every holiday to the maximum extent prescribed by Jewish law. The Conservative and Reconstructionist branches have more liberal observance practices, while the Reform branch tends to observe the holidays in a less traditional manner, often adjusting observance to their particular secular lifestyle.

Nevertheless, there is unanimous concurrence, among all four branches, of the *existence* of each of the holidays. By way of example, Rosh Hashana, the Jewish New Year, always occurs on the first day of the first Jewish calendar month (corresponding to either September or October on the Gregorian calendar). However, while Orthodox and Conservative Jews celebrate two days of Rosh Hashana, many (though not all) Reform and Reconstructionist celebrate only the first day.

Further, on the Sabbath and on most major holidays, Orthodox Jews refrain from engaging in most daily activities, such as working, traveling in a vehicle, turning on lights, answering the telephone, handling money, carrying objects outside the home, etc. Many Conservative Jews, interpret the “no work” on the Sabbath in a more liberal manner, and they may answer the telephone, turn on lights, drive a car, etc. While Reform Jews attend synagogue and may have celebratory meals on the Sabbath and the holidays, they observe very few of the other restrictions.

One of the key issues in assigning appropriate holiday schedules in custody/visitation matters, is to learn each parent’s mode of holiday observance. For example, Orthodox parents not living within walking distance of each other cannot split a two-day major Jewish holiday because the children cannot “travel” during those two days. Similarly, assigning each parent one of the two *Seder* evenings on Passover is meaningless if both parents are Reform Jews because they celebrate only one *Seder* night.

Another important consideration is the fact that a major two-day Jewish holiday occurring on a Thursday/Friday, or on a Sunday/Monday, extends that weekend for Orthodox Jews into three days, because travel and work is prohibited on Saturday as well.

In interfaith marriages, consider that Christmas and Hannukah often conflict, as do Passover and Easter. To alleviate this possible problem, and provide a guideline to the holidays, I have set forth below a description and importance of the major Jewish holidays, as well as a 15-year Jewish calendar, corresponding to the Gregorian calendar. The dates for the other, less important, Jewish holidays can be extrapolated from the information provided.

With some limited exceptions, Jewish holidays, as well as the Sabbath, begin at sunset the evening before the holi-

day and end one hour after sunset on the last day of the holiday or Sabbath. In addition, many Jewish holidays are fast days, which require abstention from all food and liquid. Jewish females over the age of 12 and Jewish males over the age of 13 are considered adults and are required to fast. With the exception of Yom Kippur, if a fast day is on Sabbath, the fasting will take place on the Sunday following.

List of Holidays

Rosh Hashana — This is the Jewish New Year. The holiday normally occurs during the month of September but may occasionally occur in October. Rosh Hashana is celebrated by attendance at evening and morning synagogue services and celebratory meals that include eating new fruit, as well as eating apple and *challah* (special bread) dipped in honey. The holiday requires abstention from all work and other normal activities. Rosh Hashana is celebrated as a two-day holiday, although Reform Jews generally celebrate only the first day.

Fast of Gedaliah — This is a fast day occurring on the day following the second day of Rosh Hashana. Fasting begins at sunrise and ends one hour after sunset. The fast day does not require abstention from work or other normal activities.

Yom Kippur — This is considered the most important and holiest day of the year. It normally occurs in September or October, exactly 10 days after Rosh Hashana Eve. Yom Kippur celebration consists of fasting from sunset on the eve before Yom Kippur and ends an hour after sunset on Yom Kippur. It lasts one day, and requires the abstention from all work and other normal activities.

Succoth & Simchat Torah — This is a nine-day holiday that begins five days after Yom Kippur. Commencement is on the eve before the first day of Sukkoth and ends nine days later, an hour after sunset. Celebration involves the building and decorating a *sukkah* (outdoor hut), which is used during the first seven days of the holiday for all meals. Additionally a *lulav* (palm branch) and an *etrog* (a special citrus fruit) are used during morning prayers on the first eight days, except Saturdays. The first two days and last two days of the holiday are special days, requiring abstention from work and other normal activities. The “interim days” of Succoth are considered “half holidays” during which time the observances of eating in the *sukkah*, making prayers over the *lulav* and *etrog* are observed, but work and normal daily activities are generally allowed (except on the Sabbath). Orthodox and most Conservative Jews observe the nine days as outlined above. Reform Jews (and those Orthodox Jews whose domicile is in Israel), observe only the first day and the eighth day of the holiday as “special days,” and their observance of the entire holiday period ends on the eighth day.

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Hannukah — This is an eight-day holiday that normally occurs in December, but could occur in late November. The celebration consists of eight days of lighting candles, starting with one candle on the first night and adding an additional candle each evening, so that on the eighth evening, eight candles are lit in an eight-branch candelabra, called a *menorah*. The first night of lighting occurs at sunset on the evening before the first day of Hannukah. Additional celebration takes the form of special card and *dreidel* (a spinning top) games for the children, and special foods such as *latkes* (potato pancakes). Gift giving is *not* a necessary part of the holiday, although it has become customary among many Jews to give gifts to the children (this practice developed in recent history, especially in the U.S., to reduce Christmas-envy: Jewish children can boast of eight night of gifts, versus only one night for the Christian children). The holiday does not require abstention from work or other normal activities.

Asarah B'Tevet — The Fast of the 10th day of Tevet begins at sunrise on the day of the fast and ends an hour after sunset. The fast occurs seven days after the last day of Hannukah, thus it would normally occur in December or January. This fast day does not require abstention from work or other normal activities, except abstention from food and drink.

Tu B'Shvat — This minor holiday celebrates the first fruits of the year. It normally occurs in January or early February. Synagogues and Hebrew schools have special celebrations for the children, involving the new fruits. No abstention from work or other normal activities is required.

Fast of Esther — This fast day occurs the day before Purim, normally in late February or March, begins at sunrise and ends an hour after sunset. Before the fast ends, special synagogue services require the chanting of the *Megillah* (The Scroll containing the Book of Esther). No abstention from work or other normal activities, other than abstention from food and drink, is required.

Purim — This is a very joyous holiday usually occurring in late February or March, 30 days before Passover. It is normally celebrated with a costume party, a special meal in the afternoon and the delivery of baskets of food to friends, relatives and to the poor. Most synagogues and Hebrew schools have Purim carnivals for children.

Passover — This holiday is also known as the holiday of the *Matzah* (unleavened bread). It is an eight-day holiday that occurs in late March or in April and often coincides with Easter (For those who have forgotten their Bible, the "Last Supper" was the *Seder* on the first night of Passover and, yes, Jesus was Jewish). The holiday begins at sunset on the eve before the first day of Passover. For Orthodox Jews, the first

two evenings are celebrated with a *Seder* (a special ritualized meal, involving drinking four cups of wine, eating a requisite amount of *matzah*, bitter herbs, a walnut/fruit/wine concoction symbolizing mortar used by Jewish slaves in Egypt, and eating other special foods. In the realm of holiday food consumption, Passover definitely wins the prize for most varied, most symbolic and most interesting food consumption). Reform Jews, and Jews whose domicile is in Israel, celebrate only one *Seder*. For Orthodox Jews, the first two days and the last two days of Passover (first day and seventh day for Reform and Israeli Jews) are considered major holidays that require abstention from work and other normal activities. The interim days do not require abstention from work. However, all eight days require the abstention from leavened bread and other grains.

Yom Hashoah — This is the Holocaust Remembrance day; it usually occurs in April or May, 12 days after the first day of Passover. Memorial services are conducted by various synagogues. The holiday does not require abstention from work or other normal activities.

Yom Ha'atzmaut — Israel Independence Day, occurs eight days after Yom Hashoah, normally in May, but sometimes in April. The holiday involves festive activities throughout various Jewish centers but does not require abstention from work or other normal activities.

Lag B'Omer — The 34th day following the first day of Passover, usually occurs in May, but sometimes in June. While it is a joyous holiday, it does not require abstention from work or other normal activities.

Shavuot — occurs usually in May or June, and on the 50th day following the first day of Passover. It is a two-day holiday for Orthodox Jews and one-day holiday for Reform Jews and for Jews whose domicile is Israel. Shavuot celebrates the giving of the Torah. The holiday requires abstention from work and other normal activities.

Shiv'Asar B'Tammuz — is a fast day of the 17th day of the Jewish month of Tammuz, and it usually occurs in July or August, 41 days following the first days of Shavuot. It begins at sunrise and ends an hour after sunset. This fast day does not require abstention from work or other normal activities except food and drink.

Tisha B'Av — is a major fast day occurring in either July or August, exactly three weeks after Shiv'Asar B'Tammuz and begins at sunset on the eve before the Fast day and ends an hour after sunset on the day of the Fast. It does not require abstention from work or other normal activities, except food and drink.

1 *In re Marriage of Murga* (1980) 103 CA3d 49; *In re Marriage of Mentry* (1983) 142 CA3d 260; *In re Marriage of Weiss* (1996) 42 CA4th 106

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	2010:			2014:	
Purim	Sun	March 10	Purim	Sun	March 16
Passover (First 2 Days)	Tues/Wed	March 30-31	Passover (First 2 Days)	Tues/Wed	April 15-16
Passover (Last 2 Days)	Mon/Tues	April 5-6	Passover (Last 2 Days)	Mon/Tues	April 21-22
Shavuot	Wed/Thurs	May 19-20	Shavuot	Wed/Thurs	May 4-5
Rosh Hashana	Thurs/Fri	Sept. 9-10	Rosh Hashana	Thurs/Fri	Sept. 25-26
Yom Kippur	Sat	Sept. 18	Yom Kippur	Sat	Oct. 4
Sukkot (First 2 Days)	Thurs/Fri	Sept. 23-24	Sukkot (First 2 Days)	Thurs/Fri	Oct. 9-10
Sukkot (Last 2 Days)	Thurs/Fri	Sept. 30-Oct. 1	Sukkot (Last 2 Days)	Thurs/Fri	Oct. 16-17
Hannukah	Thurs-Thurs	Dec. 2-9	Hannukah	Wed-Wed	Dec. 17-24
	2011:			2015:	
Purim	Sun	March 20	Purim	Thurs	March 5
Passover (First 2 Days)	Tues/Wed	April 19-20	Passover (First 2 Days)	Sat/Sun	April 4-5
Passover (Last 2 Days)	Mon/Tues	April 25-26	Passover (Last 2 Days)	Fri/Sat	April 10-11
Shavuot	Wed/Thurs	June 8-9	Shavuot	Sun/Mon	May 24-25
Rosh Hashana	Thurs/Fri	Sept. 29-30	Rosh Hashana	Mon/Tues	Sept. 14-15
Yom Kippur	Sat	Oct. 8	Yom Kippur	Wed	Sept. 23
Sukkot (First 2 Days)	Thurs/Fri	Oct. 13-14	Sukkot (First 2 Days)	Mon/Tues	Sept. 28-29
Sukkot (Last 2 Days)	Thurs/Fri	Oct. 20-21	Sukkot (Last 2 Days)	Mon/Tues	Oct. 5-6
Hannukah	Wed-Wed	Dec. 21-28	Hannukah	Mon	Dec. 7-14
	2012:			2016:	
Purim	Thurs	March 8	Purim	Thurs	March 24
Passover (First 2 Days)	Sat/Sun	April 7-8	Passover (First 2 Days)	Sat/Sun	April 23-24
Passover (Last 2 Days)	Fri/Sat	April 13-14	Passover (Last 2 Days)	Fri/Sat	April 29-30
Shavuot	Sun/Mon	May 27-28	Shavuot	Sun/Mon	June 12-13
Rosh Hashana	Mon/Tues	Sept. 17-18	Rosh Hashana	Mon/Tues	Oct. 3-4
Yom Kippur	Wed	Sept. 26	Yom Kippur	Wed	Oct. 12
Sukkot (First 2 Days)	Mon/Tues	Oct. 1-2	Sukkot (First 2 Days)	Mon/Tues	Oct. 17-18
Sukkot (Last 2 Days)	Mon/Tues	Oct. 22-23	Sukkot (Last 2 Days)	Mon/Tues	Oct. 24-25
Hannukah	Sun-Sun	Dec. 9-16	Hannukah	Sun-Sun	Dec. 25 - Jan. 1
	2013:			2017:	
Purim	Sun	February 24	Purim	Sun	March 12
Passover (First 2 Days)	Tues/Wed	March 26-27	Passover (First 2 Days)	Tues/Wed	April 11-12
Passover (Last 2 Days)	Mon/Tues	April 1-2	Passover (Last 2 Days)	Mon/Tues	April 17-18
Shavuot	Wed/Thurs	May 15-16	Shavuot	Wed/Thurs	May 31 - June 1
Rosh Hashana	Thurs/Fri	Sept. 5-6	Rosh Hashana	Thurs/Fri	Sept. 21-22
Yom Kippur	Sat	Sept. 14	Yom Kippur	Sat	Sept. 30
Sukkot (First 2 Days)	Thurs/Fri	Sept. 19-20	Sukkot (First 2 Days)	Thurs/Fri	Oct. 5-6
Sukkot (Last 2 Days)	Thurs/Fri	Sept. 26-27	Sukkot (Last 2 Days)	Thurs/Fri	Oct. 22-23
Hannukah	Thurs-Thurs	Nov. 28-Dec. 5	Hannukah	Wed-Wed	Dec. 13-20

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	2018:			2020:		
Purim	Thurs	March 1	Purim	Tues	March 10	
Passover (First 2 Days)	Sat/Sun	March 31 - April 1	Passover (First 2 Days)	Thurs/Fri	April 9-10	
Passover (Last 2 Days)	Fri/Sat	April 6-7	Passover (Last 2 Days)	Wed/Thurs	April 15-16	
Shavuot	Sun/Mon	May 20-21	Shavuot	Fri/Sat	May 29-30	
Rosh Hashana	Mon/Tues	Sept. 10-11	Rosh Hashana	Sat/Sun	Sept. 19-20	
Yom Kippur	Wed	Sept. 19	Yom Kippur	Mon	Sept. 28	
Sukkot (First 2 Days)	Mon/Tues	Sept. 24-25	Sukkot (First 2 Days)	Sat/Sun	Oct. 3-4	
Sukkot (Last 2 Days)	Mon/Tues	Oct. 1-2	Sukkot (Last 2 Days)	Sat/Sun	Oct. 10-11	
Hannukah	Mon	Dec. 3-10	Hannukah	Fri-Fri	Dec. 11-18	

	2019:			
Purim	Thurs	March 21		
Passover (First 2 Days)	Sat/Sun	April 20-21		
Passover (Last 2 Days)	Fri/Sat	April 26-27		
Shavuot	Sun/Mon	June 9-10		
Rosh Hashana	Mon/Tues	Sept. 30 - Oct. 1	(Prior versions of this article were printed in the L.A. County Bar Association <i>Family Law News & Review</i> , Vol. XX, No.2, Spring 1999, and in the <i>Family Law News, Official Publication of the State Bar of California Family Law Section</i> , Vol 29, No.2, 2007)	
Yom Kippur	Wed	Oct. 9		
Sukkot (First 2 Days)	Sun/Mon	Oct. 14-15		
Sukkot (Last 2 Days)	Sun/Mon	Oct. 21-22		
Hannukah	Mon-Mon	Dec. 23-30		

**THE USE OF FORENSIC EVALUATIONS IN
CHILD CUSTODY CASES IN DIVORCE PROCEEDINGS
BY MADDI-JANE SOBEL, MSW, LCSW, DCSW;
STEPHEN MIKSIC, PH.D.; AND TOM HAWORTH, PH.D.**

The use of psychologists to assist the court in evaluations in disputed custody cases is commonplace in determining the “best interest of the child.” Guidelines for such evaluations can be found in the *American Psychologist Journal*, July 1994. In this article, the guidelines include a recommen-

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that the evaluator seek outside expertise from individuals “who have specific knowledge, training, and experience in child abuse, neglect, and family violence” when these issues are alleged. Unfortunately, such expertise is frequently not sought nor does the custody evaluator have the skills to determine valid findings when forensic tools and approaches are needed.

At times, questions have been raised regarding the misuse of psychologists’ influence with subsequent articles appearing in the *American Psychologist Journal* relating to concerns, vis-à-vis ethical violations, that have occurred during the course of court-ordered custody evaluations. Some of these violations are the result of alliances that have been forged between some psychologists and attorneys that bias the findings of the custody evaluation.

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It is the intent of this article to clarify issues relating to abuse and neglect allegations, to educate family law attorneys regarding the use of forensic evaluations, to advocate for a group approach in custody evaluations — particularly relating to forensic issues, and to raise questions for those attorneys in assessing the validity of the evaluations that they receive or are presenting to the court.

Under child welfare law (PA Code 55, Section 3490.4), child abuse is defined as follows:

- Any recent act or failure to act by a perpetrator that causes non-accidental serious physical injury to a child.
- Any act or failure to act by a perpetrator that causes non-accidental serious mental injury to a child or results in the sexual abuse or sexual exploitation of a child.
- A recent act, failure to act, or series of acts or failures to act by a perpetrator that creates an imminent risk of serious physical injury to or sexual abuse or exploitation of a child.
- Serious physical neglect by a perpetrator constituting prolonged or repeated lack of supervision or failure to provide the essentials of life, including adequate medical care (which includes prescribed mental health treatment), that endangers a child's life or development, or impairs the child's functioning.

All of the above acts or injuries cannot result from environmental factors that are beyond the control of the parent or person responsible for the welfare of the child but are deemed to be the result of purposeful behaviors or acts.

The code further clarifies the definitions by stating that serious bodily injury consists of a substantial risk of death or one that causes serious permanent disfigurement or protracted loss or impairment of the function of a body member or organ. More prevalent in private custody cases are allegations of physical injury, which under child welfare law is defined as follows:

- Causes the child severe pain.
- Significantly impairs the child's functioning either temporarily or permanently.

Serious mental injury is a psychological condition that requires diagnosis by a physician or licensed psychologist and that renders a child chronically and severely anxious, agitated, depressed, socially withdrawn, psychotic, and further includes interference with the child's ability to accomplish age-appropriate developmental or social tasks.

Also seen on a frequent basis in custody litigation cases are allegations of sexual abuse, sexual mistreatment, or sex-

ualized interactions between the child and an adult. In most of these allegations, the alleged perpetrator is either a parent or a family member. Sexual abuse under child welfare law is determined by such severe acts as rape, statutory sexual assault, involuntarily deviant sexual intercourse, all of which are defined by Sections 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), and 3123 (relating to involuntarily deviant sexual intercourse). Sexual assault is defined in Section 3124.1. Usually, allegations present in private custody cases involve sexual misconduct or reported sexualized interactions between the child and an adult. These include indecent assault (Section 3126), indecent exposure (Section 3127), and exploitation of a child, which is defined as an adult looking at 1) "the sexual or intimate parts of a child for the purpose of arousing or gratifying sexual desire in either person," 2) "engaging or encouraging a child to look at the sexual or other intimate parts of another person for purposes of arousing or gratifying sexual desire in any person involved," 3) "engaging or encouraging a child to participate in a sexually explicit conversation either in person, by telephone, by computer, or by a computer-aided device."

Some of these allegations are not concrete but relate to the conscious or subconscious intent of the adult or parent involved. Frequently there are concerns around inappropriate interpersonal boundaries with a child and reports of sexually reactive behaviors by a child. There are frequently reports by a parent that a child has "disclosed" touching of the child's genitals by the other parent or member of the family. A central question in such cases relates to whether the individual has an underlying sexual interest in such children and whether he or she is therefore potentially dangerous to children. Of further concern is whether these allegations are prompted by the anger that is frequently present between estranged spouses during the course of custody and divorce proceedings with the question, therefore, being raised as to the validity of the concerns and the possibility that one parent may be using these concerns to foster his or her own interests and/or to alienate the child from the other parent (the alleged perpetrator).

In order to assess the validity of these allegations, expertise and experience is required to determine whether the personality dynamics of the parents match clinical profiles that either indicate deviant sexual proclivities or anti-social personality traits, or whether they relate to clinical profiles seen in cases involving priming a child or creating parental alienation. A forensic evaluator needs to secure and determine sufficient details both from the parents and the child(ren) to determine both psychological factors as well as to elicit concrete information to indicate whether the statements made by the child are, in fact, related to sexual exploitation or violation of boundaries, sexualized interactional patterns, or in the case of touching, have an underlying

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sexual motivation. These include the ability to determine whether the statements made by the child are consistent, credible in the context described, and are concurrent with behavioral and social indicators of sexual trauma. To determine whether the reported allegations are valid or fallacious, comprehensive interviewing of the child and parents is needed, including comprehensive clinical histories, completion of various questionnaires, psychological testing and often an assessment of sexual interest provided by the Abel Assessment of Sexual Interest-2 (AASI-2). The AASI-2 provides an objective as well as a self-reported measure of sexual interest to be used in conjunction with other findings to explore and evaluate the issues raised before the court.

Also present in contested custody disputes are issues that are defined in the child protective services law as relating to imminent risk. This pertains to when one party alleges that the subject child or children in question are at "imminent" risk of sexual abuse or sexual exploitation.

The purpose of a forensic evaluation and a group approach to custody evaluations is to provide to the court the highest level of validity and comprehensiveness, which ideally uses a combination of experts to target primary issues of interest to the court and client representatives (attorneys). Forensic evaluations require higher levels of empirical evidence to provide valid and comprehensive conclusions and

recommendations to the court than are usually present in more routine custody evaluations. In addition to issues of child abuse, forensic evaluations can be used in custody cases to determine competency for legal or other proceedings, amenability to treatment or rehabilitation, degree of cognitive or intellectual impairment, as well as issues relating to parental alienation or specific problems in a child such as possible neurological deficits, learning disabilities, psychological needs or problems, and identify special problems such as autism or Asperger's Disorder.

An association of professionals with expertise in specific areas of forensic evaluations having independent competencies is the most effective resource for reaching sound conclusions and recommendations. The evaluation that results from a variety of specific expertise and competencies is least likely to result in prolonged litigation and presents to the court a more credible and powerful tool than a report limited to the areas of expertise of any single professional.

Part of any group approach to forensic evaluations should include expertise in clinical interviews, psychological evaluations, and Abel Screening when needed. A team approach provides independent and objective interviews and conclusions that are then within the group format explored and debated with questions being raised until a more comprehensive and valid conclusion(s) is reached. This group approach can be beneficial not only when forensic evaluations are needed but also in routine custody cases, in order to avoid any bias or professional alliances between any individual custody evaluator and an attorney.

PBA FAMILY LAW SECTION MEMBERSHIP INCENTIVE PROGRAM BY DANIEL J. CLIFFORD, ESQ.

In July 2008, then-Section Chair Carol Behers appointed a Subcommittee consisting of Section Secretary Christine Gale, Treasurer Dan Clifford and Council Member Sandra Davis to review the possibility of creating a scholarship program to assist qualified Section Members by defraying some of the costs of attending Section Conferences.

At the January 2009 Council Meeting in Pittsburgh, Council voted in favor of establishing a Membership Incentive Program that designates \$2,000 annually for scholarships.

The scholarships will cover the payment of registration fees for attendance at one of the annual Conferences.

Eligible recipients are Section Members who are:

- (a) young/new to the practice;
- (b) from solo practice or small firm; and/or

- (c) from counties that have been under-represented at Section Conferences.

The Resolution passed Council unanimously and the first set of scholarships were available for the Winter 2010 meeting in Hershey.

For the January 2011 Winter Meeting in Lancaster, the Membership Incentive Program will be administered by Chair-Elect Joseph Martone and First Vice Chair Christine Gale, who will make a recommendation to Chair Cheryl Young for Executive Committee approval.

Interested applicants should forward their CV and a brief statement as to why they believe they are eligible for the scholarship to the attention of Michael Shatto, PBA, P. O. Box 186, Harrisburg, PA 17108-0186.

Applications should be submitted no later than Dec. 15, 2010.

HEALTH CARE REFORM 2011: THE “FAMILY-FRIENDLY” ADULT CHILD MANDATE BY SARAH LOCKWOOD CHURCH ESQ. AND JONI LANDY, ESQ.

INTRODUCTION

The Patient Protection and Affordable Care Act (P.L. 111-148), as amended by the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152), combined, make up the law commonly referred to as Health Care Reform. This article refers to Health Care Reform as the Affordable Care Act or the ACA.

The ACA amended the Public Health Service Act (PHSA). New group health care plan “mandates” appear in Title XXVII, Part A, Individual and Group Market Reforms, Subpart II, entitled “Improving Coverage.” Generally, the provisions of Subpart II, Part A, Title XXVII of the PHSA have been incorporated by reference into the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code of 1986, as amended (Code).

Most of the ACA guidance to date has been issued in the form of Interim Final Regulations issued jointly by three separate agencies: Health and Human Services (HHS), the Internal Revenue Service (IRS) and the Department of Labor (DOL). However, some guidance has taken the form of sub-regulatory guidance as well as “Frequently Asked Questions” (FAQs). (HHS, IRS and DOL may be referred to, collectively, as the “Agencies”).

Although many of the provisions of the ACA are phased in over a number of years, this article focuses primarily on the adult child mandate effective the first day of the first plan year beginning or after Sept. 23, 2010. For group health care plans that are maintained on a calendar year basis this is generally, Jan. 1, 2011. Individual policies of health care insurance must also comply with the adult child mandate in 2014.

During the Congressional debate over Health Care Reform in early 2010 many of us heard: “if you like the health care coverage you have, you can keep it.” This goes to the “grandfathered” concept. If an employer maintained a group health care plan (GHP) on March 23, 2010, it is considered a “grandfathered plan.” If the employer makes no changes to the plan that removes the plan from “grandfathered” status, the plan is exempt from some, but not all of

the ACA’s GHP mandates, or the mandates may apply somewhat differently. New plans and plans that lose their grandfathered status must comply with all ACA GHP mandates. Both grandfathered and non-grandfathered plans must comply with the adult child mandate discussed below; however, a grandfathered plan is not required to provide the coverage if the adult child has access to other employer-provided group health coverage (other than a plan of the child’s parent). In 2014, grandfathered plans must offer coverage to otherwise eligible adult children even if they are eligible to participate in another employer-provided plan.

Background

Many GHPs that offer dependent coverage are already required to cover some adult children under state law mandates and/or state laws requiring continued health care coverage as well as under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (COBRA).

A. State Law Mandates Applicable to Fully-Insured Plans

In many states, fully-insured GHPs are already required to provide coverage to older children of eligible employees. In Pennsylvania, for example, Act 4 of 2009 requires each insurer that issues a policy in Pennsylvania offer the employer the right to include adult child coverage in the policy. In Pennsylvania, the adult child coverage is to age 29 and extends only to children who are not married, have no dependents and have no other coverage. An additional premium can be charged for this coverage and the adult child must be either a full-time student or a resident of Pennsylvania. The state law adult child eligibility requirements and outside age limitations vary from state to state.

B. Continuation Coverage for Older Children Required by COBRA

While state law mandates have required fully-insured plans to extend coverage to adult children, so has continuation coverage under the COBRA. The requirement to provide COBRA coverage to children who “age out” of a plan or no longer meet the Code’s definition of “dependent” applies to both fully-insured plans and plans that are self-insured by the employer. Under COBRA, however, the adult child (or the parent) would be required to pay the entire cost of coverage plus an administrative fee. COBRA coverage will still be

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Sarah Lockwood Church (schurch@thorpreed.com) and Joni Landy (jlandy@thorpreed.com) are members of the Employee Benefits and Executive Compensation Practice Group at Thorp Reed & Armstrong L.L.P., Pittsburgh. The foregoing article is based on guidance issued by the Agencies as of November 1, 2010.

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there, and can be elected, even when a child is no longer eligible for coverage under the new ACA adult child mandate discussed in more detail below.

The Adult Child Mandate under the ACA

Under the ACA, a plan (both insured and self-insured) that offers dependent coverage must also offer coverage to an employee's child until the child turns age 26. This mandate is contained in amendments to the PHSA (new § 2714), but is incorporated by reference into § 9815 of the Internal Revenue Code and § 715 of ERISA.

The requirement to cover adult dependents is, generally, effective for plan years beginning on or after Sept. 23, 2010. (However, the HHS secretary convinced many insurance carriers to offer this coverage under their policies in 2010 in order for parents to cover their adult children who were, for example, graduating from college.) Plans maintained on a calendar year basis (and that offer dependent coverage) must provide the mandated adult child coverage effective Jan. 1, 2011. Interim Final Regulations were issued by the Agencies on May 14, 2010 (May 14, 2010 Rules) that provide guidance on the adult child mandate.

A plan cannot impose *any* conditions on a child's eligibility *except to specify how the child must be related to the employee-participant*. For example, a plan may specify that it only covers natural children (including adopted and placed for adoption) but not any other children. But a plan may not impose any other condition on the child's eligibility, such as a requirement to be financially dependent on or reside with the participant or be enrolled full time in school. While coverage must be extended even to a married adult child under age 26, coverage does not have to be extended to a spouse or child of the eligible adult (i.e., grandchildren).

According to FAQs about the ACA issued by the DOL (See Q & A 14 at www.dol.gov/ebse/faqs/faq-aca.html) plans may limit age 26 coverage to those dependents covered the plan who are related to the employee-participant in the ways described in Internal Revenue Code § 152(f)(1). Those relationships include a son or daughter, stepson or stepdaughter of the employee (including such persons that are legally adopted by or lawfully placed with the employee for legal adoption) and an eligible foster child. "Eligible foster child" means an individual who is placed with the employee by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction. According to this same FAQ, "[f]or an individual not described in Code section 152(f)(1), such as a grandchild or niece, a plan may impose additional conditions on eligibility for health cover-

age, such as a condition that the individual be a dependent for income tax purposes."

A. Special Enrollment Opportunity

The May 14, 2014 Rules also require plan sponsors to provide a special enrollment opportunity to any child who may have previously "aged out" under the plan or were otherwise not eligible for coverage under the plan. Plan sponsors must provide a notice of this special enrollment opportunity. Under the DOL guidance, notice to a covered employee will be deemed to be notice to the adult child. At least 30 days must be provided for individuals to enroll and the DOL has issued "Model Language for Notice of Opportunity to Enroll in Connection with Extension of Dependent Coverage to Age 26." This notice may be found at www.dol.gov/ebsa/healthreform/

B. Tax Considerations of Expanded Dependent Coverage

Each GHP defines "child" or "dependent" for coverage eligibility and, in many cases, has conformed this definition to comply with Code Section 152. Under Code § 105(b), employer-provided health care coverage to an employee, the employee's spouse and "dependents" is not taxable. Under Code § 152, the term "dependent" falls into one of two groups: a "qualifying relative" or a "qualifying child. Under the ACA's amendment to Code § 105(b), which was effective March 23, 2010, employer-provided health care provided to the employee's "child" under age 27 will be excluded from the employee's gross income.

The IRS issued Notice 2010-38, which provides guidance on the tax treatment of employer-provided coverage to a taxpayer's child under age 27. "Children" that are eligible for tax-free coverage are defined in Code § 152(f)(1) that are the employee/participant's son or daughter, stepson or stepdaughter, persons that are legally adopted by or lawfully placed with the employee for legal adoption or an eligible foster child can be provided the coverage on a tax-free basis. This Notice clearly states that the exclusion from income applies to any "child" of the employee who has not turned age 27 at any time during the employee's tax year, including a child that is not the employee's dependent under Code § 152(a). This means that the age limit, residency, support and other tests included in Code § 152(c) do not apply for purposes of the exclusion from income provisions of Code § 105(b). The exclusion from the employee's income only applies if the adult child is still age 26 at the end of the tax year. The Notice also confirms that, although not clear under the ACA, this same income exclusion will apply to employer provided accident and health plans under Code § 106, and health reimbursement arrangements or HRAs.

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Notice 2010-38 also provides that coverage for or reimbursements to an employee's adult child under age 27 may be made under a cafeteria plan (including a health flexible spending account) and that regulations under Code § 125 will be amended, retroactively to March 30, 2010, to include change in status events affecting non-dependent children under age 27. The Notice further clarifies that the value of this extended coverage is excluded from wages for purposes of FICA and FUTA and that the covered adult child is deemed to be a dependent for these purposes.

While the ACA does not specifically address the premiums or costs that may be charged for the coverage of children under the age of 27 who are no longer tax dependents, the May 14, 2010 Rules provide that the adult child or parent/employee cannot be required to pay more for the coverage than for other dependent children. An additional charge cannot be made based upon the age of the child. However, it would be permissible for a plan to provide coverage and charge a premium based upon the number of dependents covered (i.e. employee plus spouse coverage would be employee +1, employee plus spouse and a child would be employee +2, etc.).

A BENEFIT PRACTITIONER'S COMMENT:

The regulation of group health care plans by the federal government began with the favorable tax treatment of employer-provided health insurance under the Internal Revenue Code. Then there was Medicare, which is not a program many individuals would like to see eliminated. The enactment of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (COBRA), requiring group health care plans to provide continuation coverage to "qualified beneficiaries" after "qualified events," represent-

ed a major step toward reform of the U.S. health care system. COBRA was followed by the Health Insurance Portability and Accountability Act or HIPAA in 1996, which (although not mentioned prominently in the Health Reform debates) went a long way toward eliminating pre-existing condition exclusions. HIPAA was followed by a number of other federal laws regulating coverage under employer-sponsored health care plans. States have enacted mini-COBRA laws both requiring continuation coverage for small plans not subject to Federal COBRA and laws requiring insured programs to cover older children. Clearly, the ACA will provide both challenges as well as opportunities to a number of different interested groups: insurance companies, providers of health care, employers who are plan sponsors, and individuals. However, contrary to the "sound bite" sometimes heard regarding Health Care Reform being a "government takeover of health care," the ACA is not the government's first involvement in the regulation of employer-sponsored group health care. Many of the ACA mandates, including the adult child mandate, discussed above, will be very popular and therefore, not likely to be repealed.

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QDRO OR BUYOUT: PREPARING TODAY FOR A SECURE TOMORROW BY THEODORE K. LONG JR.

One of the most complex and difficult decisions a divorcing couple faces is the division of the pension rights accumulated during the marriage.

Some 84 million Americans work for companies that maintain Employee Retirement Income Security Act (ERISA)-covered retirement plans that are divisible by Qualified Domestic Relations Orders (QDROs), which guarantee the non-worker spouse (the non-owner, who is usually the wife) a share of her husband's pension. Or the couple can opt for a buyout (sometimes called an immediate offset), by which one spouse trades away pension rights for another asset.

Normally, divorcing couples face a situation where the husband is the pension holder and the wife is the non-owning spouse who is entitled to a share of the pension benefits he earned during the years of their marriage. Sometimes the wife may have her own pension, and her husband may be entitled to share of the marital portion of her pension, but generally, the husband's benefits are larger than those of the wife, who may have no pension at all or much smaller benefits because of years out of the work force.

To start, the decision to draft a QDRO, which gives the non-owning spouse income later in life, or opt for a buyout, which provides money up front, demands good legal advice and requires the services of a professional pension appraiser. Sometimes neither the pension holder nor the non-owning spouse appreciate just how valuable a pension is until it is appraised. The two most valuable assets a divorcing couple divide are the marital home and pension assets, but it is not uncommon for a thrifty couple who lived in a modest home for a long time to discover that the husband's pension may be worth more than the marital home (particularly now in the wake of the collapse of the housing market). Moreover, despite the advances women have made in the work place, the husband's career (and consequently his pension) usually come first in the economics of a marriage, which also enhances the value of the man's pension.

Theodore K. Long Jr. is president of Pension Appraisers, Inc., Allentown, a national company specializing in valuing and distributing retirement benefits in cases of divorce. Established in 1989, Pension Appraisers, Inc. has valued over 30,000 defined benefit and defined contribution pension plans and assisted attorneys and individuals in drafting over 20,000 Qualified Domestic Relations Orders (QDRO) and Domestic Relations Orders (DRO). Phone: 1-800-447-0084; www.pensionappraisers.com and QdroDesk.com.

Sometimes, the non-worker spouse (usually the wife) may be tempted to opt for a buyout far more readily than a QDRO. The woman, faced with near-term problems like keeping a roof over her children's heads and food on the table, fails to consider the long-term problem of retirement income. Sometimes the buyout shortchanges women, particularly those whose marital contributions have been child rearing and homemaking, because it means that they head into their so-called "golden years" without any retirement income other than Spousal Social Security. This consideration should be of particular concern to a woman if she is among half the workers in the labor force without a pension and has been a stay-at-home mother who can only make a claim against her husband's Social Security benefits.

In deciding between the two, both the worker spouse and the non-worker spouse should consider the division in both the short term and the long term. A wife's willingness to take a buyout gives her leverage with her husband who may want to go into retirement with undivided pension benefits. A husband's willingness to agree to a buyout may mean he gives up the marital home but gets to keep his pension.

Very often, divorcing couples, particularly those who divorce *pro se*, may settle on a buyout of the husband's pension interest without a pension professional placing a value on the plan. Moreover, legal fees may seem off-putting, particularly when the value of the pension seems low. Consequently, the buyout price falls short of the present value of the plan. A buyout gives the recipient cash in hand now and up front or in many cases the full ownership of the marital home, but it means that the participant (often the husband) gets all the benefit of the pension in his old age and the nonparticipant (often the wife) gets nothing. And she lives to regret her decision.

GOOD LEGAL ADVICE

The decision to go for a buyout versus a QDRO or vice versa requires good legal advice. Attorneys must be well grounded, not only in the particulars of the pension plan(s) of the divorce case, but also in the subtleties of the ERISA, which is the federal law covering private pensions, and the Retirement Equity Act, which broadened the rights of divorced spouses. Retirement plans and pension rules are very complex, and dividing them challenges both attorney and client.

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As experienced lawyers know, calculating the amount to be paid to each spouse is a challenging task that often goes beyond the simple completion of forms provided by a plan administrator. QDRO preparation and approval can take months, and it involves preapproval by a plan administrator, revisions, approvals by both parties, and final approval as a QDRO. At no point in this routine does any third-party intervene to make certain that the parties are in fact receiving the right amount.

In the back-and-forth of divorce negotiations, a lawyer can easily make mistakes that work against those who opt for a QDRO, including:

1. **Failure to ask for the important information about a spouse's benefits and retirement soon enough.** Pension plans vary greatly about the terms and conditions about when a pension can be paid under a domestic relations order.

2. **Failure to prepare any pension order.** This should be done at time of the divorce. The death of a former spouse, his retirement, remarriage can reduce the benefits a former spouse otherwise would have received.

3. **Failure to obtain information about every retirement benefit that might be marital property.** Many employees have more than one pension plan at the same company. Some people have pensions from companies they no longer work for.

4. **Failure to obtain information about all pension plans provisions.** Benefits vary greatly, and some plans pay more than one type of benefit. For example, some include cost-of-living escalators and others have provisions to encourage early retirement.

5. **Failure to ask for survivor benefit or does not mention none is available.** The death of a worker-spouse may terminate the benefits. A separate interest QDRO assures the recipient benefits even if the owner spouse dies before retirement.

6. **Failure to explain how retirement benefits are usually divided under state law.** State marital and community property laws often specify the division and distribution of retirement and pension benefits. Sometimes couples can use these laws as the basis of negotiation.

7. **Failure to explain what a former spouse might do to reduce or eliminate benefits to the former partner.** Sometimes a former partner may fail to apply for a pension or waives his right to a pension, or become injured or disabled.

8. **Failure to explain how remarriage might affect benefits.** Some federal, state and local government employee benefits terminate if the former wife remarries.

9. **Failure to explore the unusual legal requirements**

or loopholes that could result in the pension order being rejected by the plan administrator. Some plans are not required to accept any court order assigning benefits to a former spouse.

10. **Failure to have the proposed pension order preapproved before being sent to the court.** This means that the plan may have to be filed with the court a second time if the administrator rejects it the first time.

11. **Failure to make sure the final pension order is sent to the plan and accepted.** Even when the payout of benefits is years away, the court order should be approved promptly.

12. **Failure to explain Social Security benefits.** These benefits are not marital property. A spouse married at least 10 years may be eligible to apply for them as a divorced spouse.

Moreover, in addition to defined benefit and defined contribution plans, family practice attorneys now must contend with a new type of retirement hybrid called a "cash balance pension plan" as well as the sometimes more daunting challenges of post-divorce pension enhancements.

BUYOUT VERSUS QDRO

After the pension appraisers determine the present value of the pension, the spouses are in a position to make the first big decision: buyout or QDRO.

Care must be taken in making sure that the buyout accurately reflects the value of what is traded off.

In her book *Survival Manual to Divorce*, Carol Ann Wilson describes how a wife took a \$12,000 baby grand piano, but passed up her chance for half of her husband's \$2,300 per month defined benefit pension, which had a present value of \$250,000. "[S]he could have exchanged her half of Frank's pension upfront for \$125,000 worth of another asset. ... Or she could have waited until Frank retires to obtain her share of the marital portion of his benefit. What seemed to have been a few thousand dollars on the surface proved to be a costly mistake in the end," Wilson writes.

Considerations other than the value of the pension may influence the decision. For example, a childless professional couple may decide to take the pension division off the table, agreeing that both spouses keep their own pensions. A middle-aged homemaker, however, may be very concerned that she faces the prospect of retirement without a pension and opt for a QDRO, which gives her a share of her former husband's pension.

Basically, however, the decision to go for a buyout or a QDRO has benefits and inabilities for both the pension owner and the nonworking spouse.

For the pension owner, a buyout means he enjoys all the benefits earned because of future increases in salary and continued years of service. For the non-owning spouse, a buyout provides cash in hand now.

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On the other hand, for the pension owner, deferred distribution via a QDRO avoids argument over the discussion and analysis involved in the pension appraisal. For the non-owning spouse, deferred distribution via a QDRO means the non-owning spouse may share in future salary and years of service earned by her former husband.

QDRO BASICS: CARE AND PATIENCE

The procedures for obtaining a QDRO may vary from jurisdiction to jurisdiction, but a few basics must be held in mind.

The terms and conditions of the QDRO must be set forth in the marital settlement or divorce decree. At a minimum, the decree should set forth the amount or percentage of the benefit to be assigned from the worker-participant, identify the plan(s) from which the benefits are to be assigned; and also other material facts, such as whether the alternate payee is to be named as surviving spouse for purposes of a joint and survivors annuity, when the benefits are to be divided and whether any post-retirement subsidies are to be included.

Obtaining an approved QDRO, one that is in place and approved by the plan administrator, can take anywhere from a month to a year or more, so a note of common-sense caution here. The worker-participant has no incentive to expedite the preparation of a QDRO, and the alternate payee receives his or her share (usually her) only if and when the QDRO is prepared and executed. Hence, it is in the interest of the alternate payee to move forward with the QDRO as soon as possible (although it is very common to wait before doing so). Needless to say, cooperation between the former spouses — the participant and the alternate payee — is highly desirable because the cost of litigation dramatically increases the expenses associated with QDRO preparation.

Rarely may a single QDRO be used for two or more retirement plans — for example a 401(k) and a defined benefit plan, and one QDRO cannot be used to cover two or more different employers.

Sometimes, a plan administrator provides a model form that can be used because it reduces the time to review the form for approval. Such forms must be used with care, however; the forms may not deal properly with the terms and conditions to which the participant and the worker have agreed. This plan “vanilla” form follows the law, but includes no extras that may be a consideration in particular pension distribution.

The practitioner must determine if the plan administrator preapproves QDROs. Preapproval means that the substance of the QDRO complies with the rules and regulations

covering QDROs and the pension plan. QDRO approval is very important. A veto by the plan administrator can stop the process, and the alternate payee has no recourse but to start all over.

The plan administrator is not responsible for the accuracy of the distribution of pension benefits. It is quite possible that the plan administrator could approve a QDRO that incorrectly distributes pension benefits because of a mathematical error made by the practitioner of one or the other spouses.

In writing a QDRO, God and the devil are in the details. A QDRO reflects what the spouses — the worker-participant and the alternate payee, usually the husband and wife — agree to regarding the division and distribution of pension benefits. The QDRO, normally written coincident with or after the divorce is final, is based on the language of the marital settlement agreement. For this reason it is a good idea that the practitioner who writes the QDROs — often the attorney of the alternate payee working from the appraisal of a pension appraiser — to make certain the agreement does what the parties wish it to do relative to the pension and its distribution. Despite this, it is not uncommon for the separation agreement to be unclear about the name of the retirement plan, the method used in allocating benefits, and even the date used in valuing the account balance. Such ambiguities invite difficulties in the preparation of a QDRO.

CASH BALANCE PLAN – NEITHER FISH NOR FOWL

Family practice lawyers are familiar with the differences between the defined contribution plan, such as a 401(k), and the traditional defined benefit plan, the old-fashioned company pension.

Attorneys drafting QDROs now must contend with a new type of retirement plan called a “cash balance pension plan” — a hybrid that is not really the fish of a traditional defined benefit plan, nor the fowl of a defined contribution plan. A cash balance plan features elements common to both. Though technically a defined benefit plan, its individual accounts, which sometimes permit lump-sum distributions upon termination, make the cash balance plan resemble a defined contribution plan. When companies began converting traditional defined benefit plans to cash balance plans, older workers protested that the new routine discriminated against those who were near retirement. Moreover, what was termed a “whipsaw” resulted in the calculation of a participant’s account value when different rates — one for compounding and one for discounting — were applied.

In a cash balance plan, Joe the Worker at XYZ Corp. receives “defined” pension credits that are a predetermined percent of his annual salary, for example, 6 percent. In addition, Joe receives what is called “interest credits,” which are

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based on the annual investment earnings, for example, 5 percent. But if in investing Joe's account, XYZ's cash balance plan receives a 12-percent return, for example, the 7 percent difference goes to the plan, not to Joe's account. Unlike returns earned in a 401(k), which can have real losses and gains in the market, the interest credits, like the pension credits, of a cash balance plan are preordained and set, and Joe has no say in investments in his account.

Many large older established companies began converting traditional defined benefit plans to cash balance plans several years ago when they began to buckle under the weight of what were termed "legacy costs" that made the traditional company pension plans so expensive. Under the old regime, a worker's pension is based on his or her final average earnings, when he or she is at his peak earning, and on his total years of service. Thus, a worker who retires at 65 with 40 years of service receives a pension based on his average salary times his 40 years of service. By comparison, under a cash balance plan, the worker receives an annual pension credit for each year's actual salary. For example, if Joe the Worker is covered by a traditional defined benefit pension plan, his accrued pension benefit is not based on a percentage of his early years when his wages are low, but based on his annual compensation later in his career when his wages are much higher.

Lawyers dividing pensions must understand the difference between the traditional defined benefit plan and the cash balance plan because the type of QDRO that is appropriate will be different (as may be the entire marital property division strategy). Most attorneys representing Joe the Worker, the participant, lean toward a deferred distribution of the cash balance plan; those representing Joe's wife, the nonparticipant, push for a cashing out with other offsetting assets.

The difficulties in dividing a cash balance pension plan may be complicated even more by the fact that many, if not most, of these plans started as traditional defined benefit pension plans. This means that the plan was converted to a cash balance regime and that, as part of the conversion, the accrued monthly benefit — the amount that would be payable to Joe the Walker on a monthly basis for the rest of his life beginning when he reaches age 65 — must be calculated. However, since the cash balance plans (like the 401(k), contain the individual accounts of all the Joe the Workers covered by the plan rather than the accrued monthly benefit amounts, XYZ Corp. must convert Joe's monthly payment to a lump sum amount. The lump sum amount of conversions has been contested in at least three federal court cases,

because litigants have contended that "the participant's stated account balance was not judged to be the actual value of the plan;" hence, the "hypothetical" quality of the account in a cash balance plan.

To deal with this, a lawyer must determine when the company established the cash balance plan and whether it was converted from a traditional defined benefit plan. Then, he can draft a QDRO using one of four basic models. They are as follows:

1. **Percent of Total Account Balance as of the Date of Divorce:** Provides the alternate payee with a specified percent of the total account balance at the time of the divorce. Ideal for a party who was not married when he enrolled under a traditional defined benefit plan.
2. **Coverture Before Conversion and Percent of Account Balance after Conversion:** Works if Joe the Worker was covered under a defined benefit plan before it was converted and married before the conversion.
3. **"Frozen" Coverture as of the Date of Divorce:** Applies a coverture-based formula to the participant's total account as the date of divorce.
4. **"Full" Coverture as of Date of Retirement:** Works if Joe the Worker was close to his retirement when his plan was converted to a cash balance and a majority of his benefits will be earned under the traditional defined benefit plan.

DEALING WITH POST-MARITAL ENHANCEMENTS

Sometimes when couples defer the distribution of retirement benefits, disputes arise later because the non-employee spouse contends she should receive a share of subsequent increases. A well-crafted QDRO insures and protects the parties' rights both pre- and post-retirement, including a Qualified Preretirement Survivor Annuity and a joint and survivor annuity.

While an immediate distribution of pension rights is the preferred route in some jurisdictions because it makes for a clean break between the parties and minimizes court involvement in the future, some courts hold that deferred distribution makes for a more equitable settlement because both spouses can share in future increases if the QDRO provides for them and is drafted that way. "Choosing a deferred distribution via a QDRO instead of offsetting assets may prevent an inequitable result," wrote an Ohio court in one case.

The downsizing of many large corporations through voluntary and involuntary early retirements has created particular considerations for divorce courts. In the past generation, millions of American workers have been squeezed out the work force early. Many longtime employees retire voluntarily but not by their own choice, or they retire involuntarily. Retirements under these circumstances may obscure an easy distinction between types of severance pay and early invol-

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untary retirement benefits, particularly when a person retires early after a divorce. Sometimes early retirement benefits can be seen as compensation to an employee for a specific service, that is, retiring early. Courts face the challenge of deciding what portion of these benefits is separation pay (and separate property) and what portion are retirement benefits earned during a marriage (and marital property).

Courts are divided about the sharing of post-divorce pension increases (e.g., early retirement subsidies and benefit enhancements), particularly for deferred distribution pensions. Predictably, when a dispute arises, the employee spouse (often the man) argues that the increase happened after the marriage, and the sharing spouse (often the woman) asserts that the increase happened as a result of years of employment during the marriage.

Courts have taken different positions about the sharing of post divorce separation pay. Generally, separation pay after a divorce as a result of involuntary retirement is viewed as separate property because they are seen as compensation for lost future earnings. Overall, courts may look at early retirement benefits as compensation for past service if the employee is at a high point in his or her productivity rather than a low one.

Voluntary early retirement by the pension-owning spouse creates the risk that he or she may retire for the bad-faith reasons for a larger share of the retirement pie.

In recent years, some workers, particularly those in state and local government, have elected to participate in DROP retirement programs. DROP means deferred retirement option program. Under DROP, the worker no longer accrues service, and he is treated as if he retired while continuing to work. Benefits he has earned are paid into an account in his name, which is paid interest and any cost-of-living increases he would have received if he had been retired. DROP permits an employee to postpone collection of benefits he has earned, and they are classified, in the event of a divorce, in the same way they would have been classified if the DROP route had not been taken.

For obvious reasons, both parties and their lawyers must clearly consider pension benefits. Tempting as it may be to take a buyout, a woman — particularly one going into the golden years on her own — should make certain she understands what she is giving up. More than a few women have lived to regret bad advice and bad decisions about a former spouse's pension. For them, the so-called golden years of retirement can become a grim slog across the rocky terrain of financial hardship, if not poverty. A career homemaker who divorces in midlife often finds herself facing vastly reduced circumstances in the wake of a marital breakup.

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ALTERNATIVE PLEADING IN A DIVORCE ACTION? NOT SO FAST!

BY JAMES W. CUSHING, ESQ.

When filing a divorce complaint, it appears that a typical lawyer's standard pleading philosophy is to make as many claims as possible, relying on the court or opposing counsel to take the appropriate action to strike the weakest claims; a strategy often referred to as "throw as much mud against the wall and see what sticks!" The Pennsylvania Rules of Civil Procedure (Pa. R.C.P. 1020 and 1021) appear to support such a strategy by specifically allowing alternative pleading as well as pleading contradictory claims. In fact, the Supreme Court of Pennsylvania has explicitly ruled that "[t]hese rules reflect the general principle that plaintiffs should not be forced to elect a particular theory in pursuing a claim." *Republic Intermodal Corporation and Sullivan Lines, Inc. v. Doris Leasing Company, Inc. and Union National Bank of Pittsburgh*, 473 Pa. 614 (1976).

When filing a divorce complaint, it appears that most attorneys maintain the aforesaid strategy by simultaneously making claims for a divorce under Sections 3301(c), 3301(d), and sometimes 3301(a) of the Pennsylvania Divorce Code, as standard practice. For the benefit of those who are not familiar with the Divorce Code, Section 3301(c) permits a no-fault divorce after the filing of Affidavits of Consent by both parties and 90 days have elapsed after the filing of a divorce action. Section 3301(d) allows for a no-fault divorce to be unilaterally secured by one spouse after two years of separation. 3301(a) is a traditional and old-fashioned fault-based divorce claim.

Although the Rules of Civil Procedure appear to allow for alternative pleading, even in the context of divorce, there are a growing number of cases that appear to proscribe alternative pleading in divorce in certain circumstances. One question that has arisen is: can a plaintiff in a divorce action, filing under Section 3301(c) and 3301(d) and/or 3301(a) refuse to file an Affidavit of Consent to consent to his own divorce action? It would appear, under the above rules and case law that a plaintiff in a divorce action has the choice of proceeding under whichever claim he wishes. However the courts have increasingly limited this right under certain circumstances.

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Pennsylvania courts, in an increasing number of cases, have ruled that refusing to allow a plaintiff's divorce action to progress through the quickest route possible unfairly and inappropriately prejudices the opposing party. Consequently, if a plaintiff files under Section 3301(c), the courts have increasingly taken the position that one cannot refuse to file an Affidavit of Consent under Section 3301(c). The prejudice to the opposing party is fairly obvious: first, the filing of a divorce action is often accompanied by the filing for (and granting of) alimony *pendente lite*. Alimony *pendente lite* is support for the opposing party that can only be received during the pendency of a divorce action. Therefore, taking action to prolong one's own divorce action only serves to extend the time the opposing party has to pay alimony *pendente lite* without recourse to stop it. Second, it prolongs the time the parties are married, which can have any number of implications. The courts have taken the position that the refusal to consent to one's own divorce action is an abuse of the divorce process and one cannot receive the benefit of the divorce action without taking reasonable steps to expeditiously conclude it.

Although the courts have ruled that one cannot refuse to file an Affidavit of Consent, can a court force a party to execute the affidavit? Thus far, the courts have been reluctant to force the execution of an Affidavit of Consent. The cases deciding this issue to date have established the penalty for refusing to consent to one's own divorce to be the dismissal of the divorce action *in toto*, which, by definition, simultaneously dismisses the alimony *pendente lite*. It does not yet appear that sanctions against the party refusing to consent to his own divorce action are among the penalties to be assessed, but the cases do not proscribe such a result.

A subset of cases involving a party refusing to consent to his divorce is growing in the circumstance where the party is receiving spousal support rather than alimony *pendente lite*. The crucial distinction between spousal support and alimony *pendente lite* is that spousal support is not dependent upon the existence of a divorce action. Spousal support can be successfully requested and received by a spouse absent a divorce action, but is definitively concluded when the parties are divorced. Therefore, dismissing the divorce action as a penalty for refusing to file an Affidavit of Consent, does not resolve the prejudice of having an artificially prolonged spousal support order in place against the opposing party. In this instance, judicial economy arguments are raised in the

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context of the individual factual circumstances of each case. The specific issue is whether dismissing the divorce claim has any positive effect on the spousal support claim. If not, then dismissing the claim may not be a viable alternative to correct the prejudice against the opposing party. It is in this situation that sanctions are most likely to be assessed to remedy the clearly unjust situation.

In the final analysis, when filing for a divorce, one has to be aware of the implications of the existence of an order for spousal support or alimony *pendente lite* on the speed in which one would like divorce action to proceed. Relatedly, if one files under Section 3301(c) of the Divorce Code, one must be prepared to file an Affidavit of Consent, otherwise one should only proceed under the other sections of the Divorce Code. Relevant cases on this topic are: *Skelly v. Skelly*, 36 Pa.D.C.4th 189 (1997); *Norris v. Norris*, 10 Pa. D. & C.4th 207 (1991); *Mellot v. Mellot*, 1 Pa.D.&C.4th 618 (1988); *Burk v. Burk*, 38 Pa.D.&C.3d 558 (1986); *Way v. Way*, 35 Pa.D.&C.3d 653 (1985); *Rueckert v. Rueckert*, 20 Pa.D.&C.3d 191 (1981).

Federal/Military Corner:

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THE *JARVIS* CASE AND THE MYSTERY OF THE MISSING SURVIVOR ANNUITY

Background

There's no doubt that Mrs. Jarvis missed out on important part of the division of her husband's military pension. But it was probably a self-inflicted wound.

After a marriage of about 16 years, Diana Jarvis filed a complaint in divorce on May 6, 2004, and then promptly left the state. She moved to New Jersey where, the Common Pleas Court for Berks County notes, she "continues to live." Her first attorney withdrew after 11 months on the job, and it took only about five months for her second lawyer to leave. Appearing *pro se* for most of the proceedings, she hired her third attorney upon entry of the Decree in Divorce (May 4, 2006), containing the terms for distribution of marital assets and liabilities.

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She had a long-term marriage (June of 1986 till January 2003, with the divorce 3-1/2 years later). Her ex-husband, Aaron Jarvis, was a military retiree, and she received about \$900 a month as her share of his retired pay. She also received alimony.

But she missed out on the Survivor Benefit Plan (SBP), as is made clear in the 2006 reported decision in *Jarvis v. Jarvis* from the Common Pleas Court of Berks County.¹ The Common Pleas Court found that:

- Mrs. Jarvis claimed that the court erred in refusing to grant her coverage as defendant's surviving spouse beneficiary for his military pension;
- Such coverage was needed for her to get military medical benefits;
- The issue of coverage was not raised at the Master's hearing;
- Mr. Jarvis appeared through counsel at the DRO hearing, but Mrs. Jarvis "decided not to proceed with the action"; and
- The financial impact on the parties of survivor annuity coverage is unknown.²

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It is not know how long the parties were married during the husband's military service, but it is a good guess that the period was substantial in light of the almost \$900 a month pension share that Mrs. Jarvis received. There is no doubt that she was "the military spouse," that is, the one who usually moves from base to base with her husband every three or four years, and whose mobility makes it close to impossible to land and retain a job that provides good earnings and a retirement plan. All the more reason then, for the Survivor Benefit Plan to be a part of the pension division at retirement.

This article, and the subsequent two installments, will explore what SBP is, how much it costs, who pays for it, how to protect the non-military spouse and how to adjust the benefit amount. Also covered will be deadlines for elections, how to use a court-ordered election when the SM or retiree will not cooperate, dealing with deadlines, where to send the documents, and how Mrs. Jarvis should have argued her case to convince the master that she should have received SBP former-spouse coverage. Finally, we'll also touch on the argument that Mrs. Jarvis made regarding SBP as a basis for military medical benefits.

What is the Survivor Benefit Plan?

Since death terminates pension payments, practitioners should be familiar with the Survivor Benefit Plan (SBP).³ SBP is an annuity program that allows retired (or retirement-eligible) active-duty servicemembers (SMs) to provide continued income to specified beneficiaries at the time of the participant's death. The retiree's paycheck is the source of monthly premium payments for SBP coverage, and this is partly subsidized by the government. There is a modest tax break for the retiree because the SBP premium is excluded from the taxable portion of his or her retired pay. The SM decides what benefit amount shall apply and to whom the benefit is paid. The designated survivor will receive a lifetime annuity for 55 percent of the designated base amount.⁴ The SM may select spouse coverage, coverage for the spouse and qualifying children, or coverage for qualifying children only.

The cost for SBP varies depending on the type of coverage selected and the base amount chosen. In general, the premium rate for spouse or former spouse coverage is 6.5 percent of the selected base amount for those who entered military service after March 1, 1990; there is an alternative rate structure for those who entered military service on or before that date.⁵ The benefit is 55 percent of the base amount.

Thus, for example, assume that the total military retired pay for John Doe (before pension division) is \$3,000 a month and that he selected the full amount of his retired pay

as the base amount for Mrs. Doe's benefit. The maximum SBP payment for Mary Doe would be \$1,650 a month (55 percent of retired pay). The premium would be about \$195 (6.5 percent of total retired pay), which is deducted from his retired pay.

Any election other than spouse-only at the full-retired-pay base amount requires spousal concurrence. Whenever counsel or the court is using deferred division for the military pension (i.e., almost 100 percent of the time), the attorney for the SM's spouse should seriously consider SBP coverage. This benefit allows continued payments if the spouse survives the SM. Without this valuable tool in planning for continued income for the nonmilitary spouse, the stream of income ends with the death of the pensioner.

Benefits and Disadvantages of SBP

When counseling Mrs. Doe, the nonmilitary spouse, the attorney should know that there is no simple answer as to whether she should ask her husband or the court for SBP coverage. Too much depends on conditions, facts, issues and limitations that are unique to the parties' marriage. For example, if Mrs. Doe has a well-paid job and little need for immediate security upon the death of her husband or ex-husband, then she might choose no death benefit at all, or perhaps life insurance only. Should she have no job outside the home and small children to raise, her needs for immediate security upon the death of the family's main provider are obvious. It is essential to know the pros and cons for SBP.

The advantages of SBP coverage for Mrs. Does are numerous. The first is security. Unlike commercial life insurance, SBP does not require a person to "qualify" for coverage, and neither party must undergo a physical examination. Coverage cannot be refused or lapse while premiums are being paid. The SM generally cannot terminate coverage (except with the spouse's consent). Mrs. Doe will receive payments for the rest of her life upon her husband's death.

Another reason for choosing SBP is cost. Deductions from Mr. Doe's retired pay for SBP premiums are from the total gross retired pay. This reduces his pension income (and her share of it) for tax purposes. Payments are increased regularly by cost-of-living adjustments to keep up with inflation. There are no expenses for commissions, advertising or profit, which commercial life insurance premiums include, and costs are not based on age or financial forecasts.

While cost might be an advantage in one sense, it also is among the disadvantages of SBP. Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive as compared to term life insurance, and premiums increase over time.

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Another disadvantage is inflexibility; as a general rule, once SBP is chosen, it cannot be canceled. In addition, there is no equity build-up and no cash surrender value, which would be present in a policy of whole life or variable life insurance. There is also no return of premiums paid if Mrs. Doe dies before her husband.

Payments are suspended for a widow, widower or former spouse beneficiary who remarries before age 55.⁶ No such age or remarriage limitation occurs when one purchases a life insurance policy.

¹ *Jarvis v. Jarvis*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 452, 81 Pa. D. & C. 4th 527 (2006); *aff'd*, 2007 Pa. Super. LEXIS 1987, 928 A. 2d 1134 (Pa. Super. 2007).

² *Id.*, 2006 Pa. Dist. & Cnty. Dec. LEXIS 452 at *10-12, 81 Pa. D. & C. 4th at **534-535.

³ 10 U.S.C. 1447-1455.

⁴ 10 U.S.C. § 1451(a)(1)(A).

⁵ 10 U.S.C. § 1452(a)(1)(A)(iii)-(iv); *see also* TJAGSA Practice Note, *Survivor Benefits: Congress Changes the Survivor Benefit Plan*, Army Law., Feb. 1990, at 75.

⁶ 10 U.S.C. § 1450(b).

CHECKLIST FOR SBP: PROS AND CONS

Advantages of Survivor Benefit Plan

- Security:** There is no “qualification” required; unlike commercial health insurance, no physical exam is required for the military member and coverage cannot be refused or lapse while premiums are being paid. The member/retiree cannot terminate coverage if established by court order sent to DFAS.
- Life Payments:** Mrs. Doe, the beneficiary, will receive payments for the rest of her life upon the retiree’s death (unless she remarries before age 55, which stops benefits so long as she is married).
- Tax-Free:** Deductions from the retiree’s pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
- Inflation-Proof:** Payments are increased regularly by cost-of-living adjustments to keep up with inflation.

Disadvantages of Survivor Benefit Plan

- Expense:** Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up.
- Inflexible:** As a general rule, once SBP is chosen, it cannot be canceled.
- No Cash Value:** Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Roberts dies before her husband.
- Not Divisible:** SBP is a unitary benefit, cannot be divided between current spouse



moslem

“Can you believe it, Marlow—our little girl is finally getting divorced.”

**PENNSYLVANIA CASES IN *PRINCIPLES OF THE LAW OF FAMILY
DISSOLUTION : ANALYSIS AND RECOMMENDATIONS* (ALI, 2002)
BY JOEL FISHMAN, PH.D. AND AMY L. LOVELL, M.L.S.**

American Law Institute is known, of course, for its publication series of *Restatements of the Law*, now in its third series, but less known is its recent series called *Principles of the Law*. This latter series includes *Corporate Governance* (1994), *Aggregate Litigation* (2010), *Nonprofit Organizations* (2006-), and *Software Contracts* (2007-), of which the former two have been adopted while the latter two are still in progress as drafts.

The Principles of the Law of Family Dissolution began with tentative drafts in the 1990s and was adopted by the ALI membership in 2000 with its hardbound publication in 2002. The book is called *Principles* rather than *Restatements*

because it deals with statutory law rather than case law: “Restatement provisions often reflect value choices, but ‘Principles’ seemed the right title for a project that starts with carefully considered assumptions about the best interests of children, fairness to divorcing wives and husbands, and the legitimate economic claims of unmarried partners.” (p.123)

Unfortunately, the volume does not contain a breakdown of cases by jurisdiction. This short article then provides the references to Pennsylvania cases cited in the book under the subject heading as well as by case name in addition to a bibliography on the *Principles*.

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CLLOUD COMPUTING: WHAT IS IT GOING TO COST YOU?

BY ALICIA A. SLADE

Recently, I had a client ask to have some changes made to their system. They had decided to go with a hosting company and forego upgrades to their office computer network and file server. The client had been approached by a salesperson from a hosting company who sold them on the idea of spending hundreds of dollars a month for a hosted environment instead of paying thousands of dollars to install a new file server and related equipment. The idea was to move everything to “the cloud.” I agree that spending only a few hundred a month sounds a lot better than spending thousands. The problem is, it won’t work! This client uses several software applications in addition to Microsoft (MS) Word, MS Excel and MS Outlook in their business. None of their software applications is supported by the software manufacturers in a hosted environment. The only realistic functionality of the proposed hosted environment would be for their Word and Excel documents and their e-mail. They would still need their file server for their other software applications. The salesperson had not considered this and was going after the “quick sale,” rather than thinking about the appropriate solution. If the client had proceeded to move all of their data and software applications, they would have had a huge mess. Their business would have come to a screeching halt.

You cannot watch television or read a magazine or a newspaper without hearing about or reading about “cloud computing.” What is it? Cloud computing is the concept of hosting software and data files via the Internet. The “cloud” is a metaphor for the Internet and typically when the Internet is depicted in diagrams, it is represented by the picture of a cloud. Cloud computing is *the* hot term in the IT industry right now.

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You may even have heard about cloud computing in the seminars you attend for CLE credits. Companies everywhere are trying to see how they can cash in. You may have received sales calls offering you file hosting by Internet-based companies. But what does this all mean, how does it affect your business and what will the real costs be to a small business owner?

Cloud computing is the idea that the software that you use, along with your data, will be hosted by an Internet company and accessed via the Internet. No more worries about file servers in your office, tape backups, hard drive space and more. It does sound great, but the IT industry is quite a ways off from being able to accomplish this. Cloud computing is still in its infancy and most of the software applications you use are not ready to be hosted.

Software manufacturers are all working on web-based software applications and plan to have online offerings within the next few years. Stop and think about this for a moment, because it really is going to be costly for the small business owner. Let’s use an example of a law firm that uses Timeslips Software for time billing, QuickBooks Software for accounting, Time Matters for practice management, SupportCalc, Microsoft Office, dictation software and Adobe standard software. Each software manufacturer will have an online offering for their software. You will pay either per user login, by the number of records you have, or by the amount of data you store. There will also be a hosting company that you will pay to host your e-mail and your word processing documents, spreadsheets and pdf files. You will pay each and every manufacturer to use their software via the cloud. Let’s quantify this example with some numbers. If each software program charged \$15 per month per user, then for one user the cost would be approximately \$70 per month. If there were five users in the office, then the cost would be \$450 per month or \$5,400 per year. If there were 10 users in the office, then the cost would be \$700 per month or \$8,400 per year. Remember, you would still need a pc for each user with antivirus software to access the Internet, along with a really high-speed Internet connection. Hopefully, this analysis provides you with a new perspective to what the real costs are going to be to the small business owner to move everything to the cloud!

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This article updates the legislative history of the bills summarized in the Legislative Updates of March 2009, May 2009, October 2009, December 2009, March 2010, June 2010 and September 2010. Status of each bill is provided as of Nov. 15, 2010. The full text of the bills, as well as their legislative history, may be found by following the link “Session Info” at www.legis.state.pa.us.

Enactments

As previously noted in the October 2009 Legislative Update, **House Bill No. 270** (marriage), which became **Act No. 18 of 2009**, was approved by the governor on July 14, 2009, and took effect immediately.

ADOPTION

Senate Bill No. 1360 (Printer’s No. 2188) was approved by the governor on Oct. 27, 2010, and became **Act No. 101 of 2010**. Previously, the bill was approved by the Senate on Sept. 22, 2010, by a vote of 49-0 and approved by the House on Oct. 4, 2010, by a vote of 196-1. Act No. 101 amends the Adoption Act to (1) provide an option for a prospective adoptive parent and a birth relative to enter into a voluntary agreement for ongoing contact or communication between the child and the birth relative or between the adoptive parent and the birth relative, under new Subchapter D of Chapter 27 and (2) streamline the procedures for retrieving adoption records, under new Subchapters B, C and D of Chapter 29. Under the act, if a child is 12 years of age or older, the child’s consent to a voluntary agreement is necessary (section 2734). The court shall approve the agreement if it has been entered into knowingly and voluntarily by all parties and is in the best interest of the child (section 2735). However, failure to comply with the terms of the agreement is not a ground for setting aside the adoption decree (section 2736). Only the adoptive parent or child who is 12 years of age or older may seek to modify the agreement, and the court may enter an order modifying the agreement after finding “by clear and convincing evidence that modification serves the needs, welfare and best interest of the child” (section 2737). The act also includes provisions regarding the enforcement of the agreement (section 2738), the discontinuance of the agreement (section 2739), procedures for facil-

itating and resolving agreements involving a county child welfare agency (section 2740), court-appointed counsel and guardians ad litem (section 2741) and costs (section 2742). The new provisions of Chapter 29 provide a statutory framework for maintaining records and accessing identifying and non-identifying information regarding an adoption. Subchapter B provides for combined requests for information (section 2912), reasonable fees (section 2913), immunity from civil liability (section 2914), court and agency records (section 2915) and attorney records (section 2916). Subchapter C establishes a statewide confidential registry for the receipt, filing and retention of medical and social history information for adoptions finalized or registered in Pennsylvania. It specifically sets forth who may file and update information with the registry (section 2923), who may request information from the registry (section 2924) and how information is released from the registry (section 2925). Subchapter D concerns the release of identifying and non-identifying information by the court that finalized the adoption or by the agency (or its successor) that coordinated the adoption. Section 2931 covers who may request identifying or non-identifying information and who may be the subject of a request for such information. Section 2932 sets forth how non-identifying information is furnished. Section 2933 provides a statutory framework regarding the furnishing of identifying information, a good faith search for identifying information, authorization forms and the disclosure of information. Section 2934 sets forth where medical and social history information may be filed, who may file and request this information, how records must be maintained and how requests for information are handled. Subchapter D also contains provisions regarding confidentiality (section 2935), the refusal to search (section 2936) and original birth records (section 2937). In general, the act provides that an authorized representative (defined as an individual who has been appointed to conduct a search and who has completed a standardized training program as required by the Department of Public Welfare) must obtain a written authorization from the subject of a search before any of the subject’s identifying information is released or contact is initiated by the requestor of the information. The act also repeals sections 2905 (impounding of proceedings and access to records) and 2909 (medical history information) and makes conforming amendments regarding statutory cross-references in sections 2503(e), 2504(d) and 2511(c). The foregoing provisions of Act No. 101, which are based on the recommendations of the

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Joint State Government Commission's Advisory Committee on Adoption Law, take effect on **April 25, 2011**.

DEATH DURING A DIVORCE PROCEEDING

Senate Bill No. 53 (Printer's No. 2228) was approved by the governor on Oct. 27, 2010, and became **Act No. 85 of 2010**. Previously, the bill was approved by the Senate on Sept. 21, 2010, by a vote of 48-0 and approved by the House on Oct. 5, 2010, by a vote of 195-1. The Senate then concurred in the House amendments on Oct. 14, 2010, by a vote of 49-0. Among other things, Act No. 85 amends sections 2106, 2507, 6111.1 and 6111.2 of the Probate, Estates and Fiduciaries Code to account for a situation where a party dies during the course of divorce proceedings, no decree of divorce has been entered, and grounds have been established as provided in section 3323(g) of the Domestic Relations Code. The act conforms these four sections with Act No. 175 of 2004, which added 23 Pa.C.S. section 3323(d.1) and 20 Pa.C.S. section 2203(c). The foregoing provisions of Act No. 85 of 2010, which are based on the recommendations of the Joint State Government Commission's Advisory Committee on Decedents' Estates Laws, take effect on **Dec. 27, 2010**.

EDITORS'S NOTE:

The following bills were signed by the governor shortly before press time:

SIBLING PLACEMENT AND VISITATION

House Bill No. 2258 (Printer's No. 3849; **Prior Printer's Nos. 3218 and 3591**) was signed by the governor on **Nov. 23 as Act No. 115 of 2010**. Previously, the bill was approved by the Senate on Oct. 13, 2010, by a vote of 49-0. On Oct. 18, 2010, the bill was signed in the House. Previously, the House approved the bill on June 7, 2010 by a vote of 189-0. **The bill was then approved by the Senate on Nov. 17**. The act amends section 6351 of the Judicial Code (disposition of dependent child) by adding new subsections (b)(5), (b.1), (f)(10) and (f)(11). Under the bill, prior to entering any order of disposition that would remove a dependent child from his or her home, the court must enter findings regarding whether reasonable efforts were made to place the child with his or her sibling or whether joint placement of the siblings is contrary to the safety or well-being of either sibling. If the child's sibling is in a different placement setting from the child, the court shall enter an order that ensures visitation between the siblings no less than twice a month, unless the visitation is contrary to the safety or well-being of either sibling. The court shall review these matters concerning place-

ment and visitation at each permanency hearing. **The foregoing provisions of Act 115 take effect 60 days after signing.**

CUSTODY

House Bill No. 1639 (Printer's No. 4468; **Prior Printer's No. 2037, 3705, 3884 and 4280**) was signed by the governor on **Nov. 23, and became Act No. 112 of 2010**. Previously, the bill was approved by the House on June 14, 2010, by a vote of 191-0 and approved by the Senate with amendments on Oct. 13, 2010, by a vote of 49-0. On Nov. 15, 2010, the House concurred in the Senate amendments by a vote of 196-0. On that date, the bill was signed in the House. **The bill was then signed in the Senate on Nov. 17**. Act No. 112 repeals Chapter 53 of the Domestic Relations Code (Custody), sections 5301 through 5315, and adds a new Chapter 53 (Child Custody), sections 5321 through 5340. The bill also repeals section 4346 of the Domestic Relations Code (contempt for noncompliance with visitation or partial custody order), recodifies it as section 5323(g) and specifies that contempt is also punishable by the award of counsel fees and costs. Among other things, the bill provides for the following: requirements for standing (sections 5324 and 5325), presumptions for contested custody cases concerning primary physical custody (section 5327), factors used in determining the best interest of the child when the court awards custody with weighted consideration to be given to those factors that affect the safety of the child (section 5328), considerations regarding criminal convictions and the need to determine that a party does not pose a threat of harm to the child before making a custody or visitation order (section 5329), considerations regarding criminal charges (section 5330), court discretion to require the parties to submit a parenting plan in contested custody proceedings (section 5331(a)), the contents and form of a parenting plan (section 5331(b) and (c)), informational programs (section 5332), counseling (section 5333), a guardian ad litem for the child that includes specific powers and duties of the guardian ad litem (section 5334), counsel for the child (section 5335), access to records and information (section 5336), a statutory framework for cases involving relocation with weighted consideration to be given to those factors that affect the safety of the child (section 5337), modification of an existing order (section 5338), court-appointed child custody health care or behavioral health practitioners (section 5340) and the award of counsel fees, costs and expenses (section 5339). The bill specifies that, in general, no relocation may occur unless (1) every individual who has custody rights to the child consents to the proposed relocation or (2) the court approves the relocation. Section 5337 also addresses notice of a proposed relocation, objection to a proposed relocation, confirmation of a relocation, modification of a custody order, a relocation

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hearing, burden of proof, the effect of the failure to provide reasonable notice of a proposed relocation, mitigation and the effect of relocation prior to a hearing. In addition, the bill mandates that in making a custody determination, the court may not give preference to a party based upon gender (section 5328(b)). Section 5334(d) provides that a guardian ad litem may not testify except as authorized by the Rules of Professional Conduct but may make legal argument based on relevant evidence that shall be subject to examination by the parties. Section 5336(a)(2) states that “[a]ccess to any records and information pertaining to the child may not be denied solely based upon a parent’s physical custody schedule.” Finally, since the term “visitation” under section 5302 is repealed and does not appear in new sections 5321 through 5340, section 5322(b) specifies that when the term “visitation” is used in reference to child custody in other statutory provisions, the term may be construed to mean partial physical custody, shared physical custody or supervised physical custody. **The foregoing provisions of Act No. 112, which are based on the work of the Joint State Government Commission’s Advisory Committee on Domestic Relations Law, take effect 60 days after signing.**

Updates

House Bill No. 2429 (Printer’s No. 3594; Prior Printer’s No. 3553) received second consideration in the Senate on Sept. 28, 2010, but did not advance further in the legislative process. The bill amends section 6351 of the Judicial Code (disposition of dependent child) by adding new subsections (b.1) and (f)(10). Under the bill, if an order of disposition has been entered that removes a dependent child from his or her home and transfers temporary legal custody to a county agency, the county agency shall within 30 days of the removal exercise due diligence to identify and notify the child’s adult grandparents and other adult relatives to explain options to participate in the care and placement of the child, including becoming a foster parent, permanent legal custodian, adoptive resource or individual who will participate in the child’s planning and other activities. The bill also (1) specifies that the notice is subject to exceptions due to family or domestic violence and (2) defines the term “adult relative.” The court shall review these matters concerning the notification and explanation at each permanency hearing.

The following bills, summarized in the Legislative Updates of March 2009, May 2009, October 2009, December 2009,

March 2010, June 2010 and September 2010, have not advanced further in the legislative process.

House Bills: Nos. 90 (child abduction prevention), **120** (death during a divorce proceeding), **295** (sibling visitation), **305** (support), **433** (adoption), **434** (adoption), **435** (adoption), **437** (adoption), **438** (adoption), **463** (custody), **537** (custody), **541** (Domestic Relations Court Judges Commission), **564** (custody), **690** (support), **768** (adoption), **887** (custody; paternity), **909** (adoption), **967** (adoption), **1140** (paternity), **1347** (custody), **1372** (liability for the tortious acts of children), **1525** (adoption), **1586** (funds for the Children’s Trust Fund), **1588** (funds for victims of domestic violence), **1719** (adoption), **1797** (liability for the tortious acts of children), **1814** (forfeiture under intestate succession), **1861** (funds for victims of domestic violence), **1907** (adoption), **1968** (adoption), **1978** (adoption), **2046** (family law adjudication system), **2082** (adoption), **2206** (support of the indigent), **2429** (notice regarding dependent children), **2447** (civil unions) and **2467** (marriage licenses).

Senate Bills: Nos. 49 (alimony), **230** (paternity), **397** (support), **410** (sibling visitation), **434** (liability for the tortious acts of children), **571** (support), **625** (adoption), **854** (custody), **919** (funds for the Children’s Trust Fund), **920** (funds for victims of domestic violence), **935** (marriage), **943** (alimony), **1195** (support for the indigent), **1208** (marriage), **1221** (custody), **1265** (adoption) and **1348** (marriage licenses).

Any bill introduced during the 2009-10 legislative session but not enacted is “dead.” Therefore, for legislative action to occur on the subject matter covered in such a bill, new legislation must be introduced in the 2011-12 legislative session.

Adoption and Surrogacy Committee Seeks Input

The PBA Family Law Section has approved the formation of a committee within the section to address current issues in adoption and surrogacy and to advise the section on proposed legislation. Any PBA member interested in serving on the committee or in offering input on these subjects is asked to contact Michael Shatto at the PBA, 100 South Street, PO Box 186, Harrisburg, Pa. 17108-1086; or Joe Martone, Martone & Beasley, 150 W. 5th St. Erie, Pa. 16507-2118.

Section News:

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The Annual Winter Meeting of the Pennsylvania Bar Association Family Law Section will take place on Friday, Jan. 14, 2011, through Sunday, Jan. 16, 2011, at the Lancaster Marriott at Penn Square.

On Friday, the Section's Governing Council will meet at 3:30 p.m. Thereafter, there will be a Welcome Reception for the meeting attendees and guests, from 7 p.m. until 9 p.m.

On Saturday, after a full breakfast, a plenary session titled "Why Wait for Discovery. Hacking into the Digital Age" will be presented by **Judge Carolyn Tornetta Carluccio, Susan Ardisson, Kevin L. Hand, Beth E. Moskow-Schnoll and James Zogorski.**

After a break, two workshops will be offered. One workshop is "State Pensions Primer," which will be moderated by **Darren J. Holst** and will feature **Jonathan D. Cramer, FSA, Salvatore A. Darigo Jr. and Daniel W. Stern.** The second workshop, which will run contemporaneously, is titled "Hard Assets in Tough Economic Times" and will be moderated by **Brian C. Vertz** and feature **Judge David R. Workman, Richard Berger,** a Mellon Bank officer, and **William F. Hoffmeyer.**

During a lunch break, the **Eric David Turner Award** will be presented.

After lunch, a plenary session titled "Extra! Extra! The New Custody Statute Enacted" will be moderated by **Melissa Boyd** and will feature **Judge Emanuel A. Bertin, Maria P. Cognetti, Jeffrey M. Williams and Mary Cushing Doherty.**

Later in the afternoon, two more workshops will be offered. One is titled "Evolution and Implications of the *Balicki* Case," which will be moderated by **John C. Howett Jr.** and will feature **Judge Michelle G. Bonini, Mitchell Benson and Rochelle B. Grossman.** Another workshop,

running contemporaneously, is titled, "Estate Issues," will be moderated by **Judge Katherine B.L. Platt** and will feature **Charles J. Avalli, Robert R. Church, Karen A. Fahrner and James F. Mannion.**

After the workshops, another Reception will take place. For those who wish to continue to socialize until later into Saturday evening, a Hospitality Suite, which will offer light refreshments, will be available from 9 p.m. until 11 p.m.

On Sunday, a continental breakfast will be served for early risers. A Section Business Meeting will be conducted during breakfast by the chair, **Cheryl L. Young.** Following breakfast, Case Law and Rule Updates will be presented. They will be moderated by **Michael E. Bertin** and **Gail C. Calderwood** and will be presented by **Hilary A. Bendik, Elizabeth J. Billies, Kristen M. Daniels, Catherine M. McFadden and Gail C. Calderwood.**

The weekend promises to be both an educational and entertaining one for those in attendance. Any suggestions for future seminars and/or meeting locations should be provided to Chair **Cheryl L. Young.** Questions regarding Section business may be addressed to any of the Section Officers or members of Council at any time during the meetings or thereafter.

Reservations for attendance at the meeting in Lancaster should be made directly with the Lancaster Marriott at Penn Square by calling (888) 236-2427 before Dec. 21, 2010, to obtain the group rate.

Jay A. Blechman is a Partner with the Pittsburgh law firm of Steiner & Blechman, Section News Co-editor of the Pennsylvania Family Lawyer, Past Chair of the PBA Family Law Section and Past President and Treasurer of the Allegheny County Bar Association. William L. Steiner is a Partner with the Pittsburgh law firm of Steiner & Blechman, Section News Co-editor of the Pennsylvania Family Lawyer, a past member of Council of the PBA Family Law Section and past Chair of the Allegheny County Bar Association Family Law Section.



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Family Law Directory Search

Enter the name and/or location of the attorney you are searching for within the Family Law section. Entering multiple fields will narrow your search. **If all fields are blank, all attorneys within the Family Law section will be displayed.**

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- The Search is not case-sensitive.
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(Ex: Entering 'Jeff' in the last name field will locate 'Jeffreys', 'Jefferson', etc.)

- You can narrow your search by entering multiple fields

(Ex: Entering 'Smith' will result in all attorneys with the last name of Smith within the directory. Entering 'Smith' and choosing 'Adams County' will result in all attorneys with the last name of Smith in Adams County)

- To search only by attorney last name, leave the county and zip code fields blank.
- To search only by county, leave the last name and zip code fields blank.
- To search only by zip code, leave the last name and county fields blank.

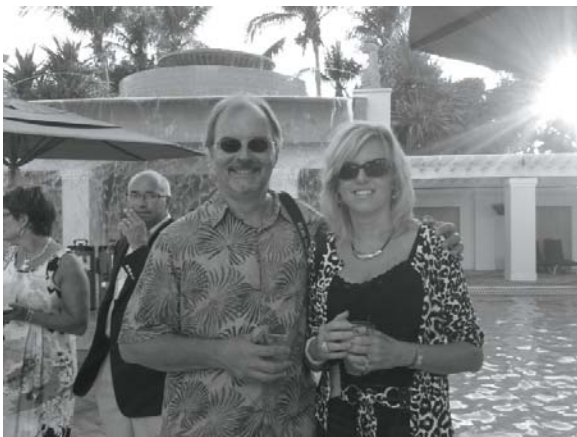
***You must log-in as a PBA member in order to access these
benefits exclusive to Section members.***

PBA Family Law Section 2010 Summer Meeting Photos

Photography by Chris Gale











**Miscellaneous Section Photos
by David S. Pollock**



Miscellaneous Section Photos by David S. Pollock



“Legal Eagle” Column Compilation Now Available

A long time ago in a galaxy far, far away, there was born one of the clearest legal minds to grace the world of matrimonial law in Pennsylvania. Patricia G. Miller was not always a lawyer. She actually graduated from the University of Colorado with a degree in chemistry and was a medical technologist. She was a longtime abortion rights activist in Colorado and Pennsylvania, where she was on the forefront of the passage of America’s first liberal abortion law in 1967. While raising three children she graduated from the University of Pittsburgh School of Law, remade herself as a civil rights lawyer, then a partner with the prominent matrimonial firm of Wilder & Miller until she established the matrimonial law group at Reed Smith L.L.P. She left the world of advocacy to become the first Equitable Distribution Master in the Court of Common Pleas of the Allegheny County Family Division having been appointed by Justice Max Baer (then Administrative Judge). She has served as the Equitable Distribution Master and a Complex Support Hearing Officer for nearly 15 years, winning accolades from the Pennsylvania Supreme and Superior Courts, the Allegheny County Common Pleas Court Judges and the Bar. More significantly, she was a co-author of the first edition of *Pennsylvania’s Family Law: Practice and Procedure*

Handbook, the author of *The Worst of Times*, published in 1993 by Harper Collins, an oral history of the impact of illegal abortions (which she wrote while taking a sabbatical at Reed Smith), a monthly column for the *Pittsburgh Post-Gazette* titled “Legal Eagle,” numerous Pennsylvania Bar Association, Pennsylvania Bar Institute and Pennsylvania Family Lawyer articles and comments and a decade and a half of equitable distribution and support decisions. Master Miller is not afraid to speak her mind in Court and outside of Court. She has strong convictions and wise thoughts, many of which were incorporated into her monthly “Legal Eagle” column. Joel H. Fishman, Ph.D., Allegheny County Law Librarian and Professor at Duquesne University School of Law was inspired one night to preserve this wonderful collection. He wanted distribution because these articles are not only important to us as lawyers, but to our clients and the general public. This book is great reading and something that all of us will be giving to our clients to consider. There are words of wisdom for each one of them — and us, too. Enjoy the reading, as I did each month.

— David S. Pollock

PATRICIA G. MILLER’S ARTICLES FROM THE “LEGAL EAGLE” COLUMN FROM THE *PITTSBURGH POST-GAZETTE* (1993-2001)

Compiled and edited by Joel Fishman, Ph.D., with a Forward by David S. Pollock, Esq.,
Pollock Begg Komar Glasser LLC, Pittsburgh, PLRI, 2008. xvii, 176p. ISBN: 978-1881751-17-7
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For more information, e-mail joelfishman1@yahoo.com

A HOLIDAY VISIT FROM ???

BY BOB RAINS, rer10@dsl.psu.edu

Perhaps I'd overdone it just a bit at the third holiday party on Christmas Eve eve. Frankly, I don't remember. My fellow attorneys may be politically conservative by and large, but they are extremely liberal when it comes to sharing liquid holiday cheer.

I know that I made it back to my office because that's where I found myself the next morning, still wearing my clothes from the day before. The only sartorial change was a big red stain (Merlot?) on the front of my shirt that I don't recall having been there when I headed to the first holiday gathering.

It had been my intention on returning to the shop to generate some billables by drafting a divorce complaint or two, complete with counts for alimony, APL, ED, custody and, of course, counsel fees. I like to think of myself as a diligent kind of guy, the sort who gets the job done. I fired up the computer, got to the forms file, filled in the names of plaintiff and defendant, and OK, I do admit that under the theory of the hair of the dog that bit me, I may have taken a swig from a flask that I keep at a secret location in my desk. Then, I don't know, did my eyes close?

At first I didn't hear the voice. Then I heard it but couldn't make out the words. Then I couldn't make them stop. The voice said, "Repent, Repent, Repent. Sin no more. Do not rend spouse from spouse, nor child from parent. Have you no heart or soul?"

"Sure I have a heart," I answered. "If I didn't, I wouldn't be here. Sure I have a soul. If I didn't, I wouldn't have heard you. But, I have a wife and kids too. And Timmy wants an iPad for Christmas. Do you know how much those suckers cost? Sally wants a Droid or something; I don't really know what it is, but it's sure to set me back a bundle."

Professor Robert E. Rains teaches Family Law and is the Co-Director of The Penn State Dickinson School of Law Family Law Clinic in Carlisle. He is still waiting for divine guidance.

"Repent. Leave the law. Go till the soil. Be at one with Mother Earth and all living things," came the reply.

"I'll think about it," I said. "Now buzz off and leave me be." Quiet slumber ensued.

Ever punctual at 8:59 a.m. the next morning, in came Mr. S, my secretary, office manager and keeper. He turned on the lights. "Another all-nighter, Boss?" he asked, adding sympathetically, "You work too darned hard."

"No," I admitted. "In fact, I'm done working hard. Done with billables. Done with the bickering parents. Done with the snarky opposing counsel who don't return my calls except when they want something. Done with judges who think that just because they were elevated to the bench they've been canonized. I'm done, through, finished. It's all over. I'm closing the office and burning my bar card. Tell the post office they can forward my mail to Walden Pond."

"That's OK, Boss. No problem. But, in the meantime, here are those interrogatories you wanted, and your new PFA plaintiff will be here in 15 minutes."

"Thanks," I said. "Do I need to change this shirt?"



WISHFUL THINKING — SOME WIT AND WISDOM
BY CHRIS F. GILLOTTI, ESQ.

As I close in on 50 years of practice, I would like to be able to say “I’ve heard it all.” Sadly, I can’t. Despite clients too numerous to count (or recognize), I am still waiting to hear any of the following:

From Wife: “I think it would be a good idea if his girlfriend got more involved with my kids.”

From Husband: “The laws in this state really favor us men, don’t they?”

Chris Gillotti has continued to actively practice law since 1964 and has been influential in creating and shaping the Pennsylvania Divorce Code and the Pennsylvania Supreme Court Guidelines (and the Allegheny County Guidelines before then). He is Past Chair of the PBA and the ACBA Family Law Sections, Past President of the ACBA, Past President of the AAML Pennsylvania Chapter, Past Board of Governors AAML and past member of Editorial Board, American Journal of Family Law. Chris is a Partner in the Pittsburgh firm of Bunde, Gillotti, Mulroy & Shultz, P.C.; 412-391-4330; Gillotti@bgms-law.com. He still doesn’t have the answer to “How can you stand to practice family law?”

From Either: “I appreciate your getting back to me so soon.”

From Husband: “When I moved I took all the good stuff — what I left at home is just junk.”

From Wife: “My husband’s a lawyer, but he’s really dumb, and he doesn’t know any judges.”

From Husband: “That judge really has it in for my wife, doesn’t she?”

From Wife: “We’re getting by just fine on the support — at the end of the month I have plenty left.”

From Husband: “I can certainly see why my wife’s lawyer needs all that information about my business.”

From Wife: “I’m doing everything I can to keep the kids away, but they really want to see their father.”

From Either: “You can trust me. As soon as I get money from the settlement, I promise your bill will be haggled over.”



*“Before you go, would you mind taking a few moments
to fill out a short form rating your relationship experience?”*

Sidebar: *Gerald L. Shoemaker, Esq.*

gls@hangle.com

Our condolences go to **Mary Sue Ramsden** of Pittsburgh's **Raphael Ramsden & Behers P.C.** and her partner Karen Peters, on the recent passing of Karen's father.

The Camp Hill firm of **Maria P. Cognetti & Associates** is pleased to announce that **Margaret (Peg) Simok** has joined the firm as an associate.

Congratulations to **Drew Taylor** of Norristown's **Weber Gallagher Simpson Stapelton Fires & Newby** and his wife Melissa on the birth of their son, Charlie.

Also at **Weber Gallagher Simpson Stapelton Fires & Newby**, **Carolyn Mirabile** has joined as partner in the firm.

Michael Viola of Philadelphia's **Shainberg & Viola** has joined Philadelphia VIP as a Family Law Staff Attorney. He will also maintain his private practice.

Gail Calderwood of **Raphael Ramsden & Behers** is the proud new parent of Grace. Congratulations to Gail and her partner Michael.

Congratulations to **Ken Meyers** of Reading and his wife Beverly on the birth of their grandson, Elijah David, who was born Sept. 28, 2010. Elijah's parents are Ken's daughter, Laurel Gibson, and her husband Stephen.

Hilary Bednick joined Pittsburgh's **Bunde, Gillotti, Mulroy & Shultz P.C.**

Julia Swain of Philadelphia's **Fox Rothschild** has been elected president of the Family Law Section of the Philadelphia Bar Association.

Elisabeth Bennington has joined the firm of **Lieber & Hammer** and the firm's name is now **Lieber Hammer Huber and Bennington P.C.**

Gerald Shoemaker is Sidebar Editor of the Pennsylvania Family Lawyer, and an Associate in the Norristown office of Hangle Aronchick Segal & Pudlin, a past member of the Councils of the PBA and ACBA Family Law Sections and active in the Montgomery County Bar Association Family Law Section.

Marion Laffey-Ferry of Butler has been named chair of the PBA Solo & Small Firm Section.

Erin C. Lentz has joined the Norristown office of **McMahon, McMahon & Lentz** as a named partner.

Aimee L. Burton has joined the Pittsburgh office of **Pollock Begg Komar Glasser LLC.**

Harry M. Byrne (Montgomery County) and his wife, Maureen, are Penn State proud parents. Their son Harry is a 3L at Villanova Law School and was recently named as an editor of the *Law Review*. Their son Patrick is in the Ph.D. program in molecular biophysics at Johns Hopkins University. And Deirdre and Kevin Byrne are attending Penn State University, from which their two older brothers graduated.

Our condolences to **Rebecca A. Myers** of Pittsburgh's **Gentile Horoho & Avalli P.C.** on the recent passing of her father.

Congratulations to **Stephanie Murphy** of Norristown's **High Swartz** and her husband Ryan, who welcomed baby girl Eleanor Rose.

Hey, gang!

You have family moments of significance: kids' births, christenings, bar/bat mitzvahs, championships, graduations ... your significant others ... and your law practices.

Let us know what is going on!

The "Sidebar" may be at the end of the *Pennsylvania Family Lawyer*, but many read it first.

So let me know what is going on by mail, fax or e-mail: Gerald L. Shoemaker, Esq.,

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Mark Your Calendar!

UPCOMING PBA FAMILY LAW SECTION MEETINGS

2011 WINTER MEETING • JAN. 14-16, 2011

Marriott Lancaster at Penn Square, Lancaster

2011 SUMMER MEETING • JULY 7-10, 2011

The Sagamore, Bolton Landing, New York

2012 WINTER MEETING • JAN. 12-15, 2012

Renaissance Vinoy Resort & Golf Club, St. Petersburg, Florida

2012 SUMMER MEETING • JULY 12-15, 2012

The Hotel Hershey, Hershey